Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DILLARD DEPARTMENT STORES, INC.,

Petitioners,

v.

HAROLD'S STORES, INC. AND
CMT ENTERPRISES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between the circuits regarding the test to be applied in determining whether §301(a) of the Copyright Act of 1976 preempts a state law cause of action?

2. In a copyright infringement action, does 17 U.S.C. §301(a) of the Copyright Act of 1976 preempt a state law cause of action based on identical conduct by the infringement defendant, or may the state law cause of action avoid federal preemption merely by requiring an additional "element" not involving any additional or different *conduct* by the defendant?

3. What is the proper test to be applied in determining whether §301(a) of the Copyright Act of 1976 preempts a state law claim?

PARTIES

The names of all parties in the court whose judgment is sought to be reviewed appear in the caption of this Petition for Writ of Certiorari. There are no related companies, subsidiaries, or affiliates of Petitioner Dillard Department Stores, Inc. which meet the requirements of Rule 29.6.

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S. Rep. No. 473, 94th Cong., 1st Sess. (1975) 7, 8

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HAROLD'S STORES, INC. AND
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Respondents.

PETITION FOR WRIT OF CERTIORARI

Dillard Department Stores, Inc. ("Dillard's") respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 6, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 82 F.3d 1533 (10th Cir. 1996), and is reproduced beginning at Appendix page 1. The rulings of the district court are unreported. The March 21, 1994 Opinion of the district court denying Dillard's Motion for partial summary judgment is reproduced beginning at Appendix page 40. The April 12, 1994 Opinion of the district court denying Dillard's Motions for reconsideration is reproduced at Appendix page 50. The May 16, 1994 Jury Verdict and Judgment awarding damages to respondents Harold's Stores, Inc. and CMT Enterprises, Inc. (collectively "Harold's") are reproduced at Appendix page 54. The September 2, 1994 Opinion of the district court denying Dillard's renewal of Motion for judgment as a matter of law after trial is reproduced at Appendix page 57. The October 5, 1994 First Amended Judgment of the district court is reproduced

at Appendix page 62. On February 14, 1995, the trial court entered orders: (1) denying Harold's request for a permanent injunction (Appendix, Page 65), (2) approving Harold's Bill of Costs of $38,560.76 (Appendix, Page 68), and (3) awarding Harold's a $30,000.00 attorney fee on its Oklahoma antitrust claim (Appendix, Page 68).

JURISDICTION

The Opinion of the Court of Appeals was entered on May 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This appeal involves the preemption provision of the Federal Copyright Act, 17 U.S.C. §301:

> **§301 Preemption with respect to other laws**
>
> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
>
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —
>
> (1) subject matter that does not come within the subject matter of copyright as

> specified by sections 102 and 103 . . .
> or
> . . .
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

Appendix, page 74.

In particular, this appeal concerns the question of whether 17 U.S.C. §301(a) preempts the Oklahoma Antitrust Act, 79 O.S. §1:

> **§1. Trust in restraint of trade illegal**
> Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

Appendix, page 77.

Finally, this appeal concerns the remedies available against an infringement defendant, 17 U.S.C. §412:

> **§412 Registration as prerequisite to certain remedies for infringement**
> In any action under this title, other than an action brought for violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—
> (1) any infringement of copyright in an unpublished work commenced before the

> effective date of its registration; or
> (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Appendix, page 78.

STATEMENT OF THE CASE

Nature of the Action

Respondents Harold's Stores, Inc. and CMT Enterprises, Inc. (collectively "Harold's") brought this copyright infringement action against Petitioner Dillard Department Stores, Inc. ("Dillard's") seeking damages and other relief from Dillard's under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*, for infringing Harold's copyrighted fabric designs on women's garments; and Harold's individually sought damages and other relief against Dillard's for violation of the Oklahoma antitrust statute. 79 O.S. §1.

In its state antitrust claim, Harold's alleged that Dillard's act of copyright infringement was an act in restraint of trade and thereby also constituted an antitrust violation under the Oklahoma antitrust statute.

Operative Facts

Dillard's and Harold's are both retail department stores operating in various parts of the United States, including Oklahoma. Both Dillard's and Harold's develop and sell their own private label clothing.

The garments involved in this litigation were Dillard's

private label skirts acquired by Dillard's through different sources for sale in Dillard's stores during the 1993 summer season. These garments were made from fabric with designs similar or identical to the fabric designs used on garments sold in Harold's during the 1991 and 1992 seasons. Dillard's sold a few thousand of these garments before learning that the designs infringed upon Harold's copyrights. Harold's filed for and obtained the copyright registrations for the subject designs more than three (3) months after such designs were published, and after commencement of Dillard's alleged infringement.

The District Court Rulings

The district court based its jurisdiction over the copyright infringement claim upon 17 U.S.C. §501 and 28 U.S.C. §1338(a). The district court exercised supplemental jurisdiction over the state claims pursuant to 28 U.S.C. §1338(b).

As a result of Dillard's actions, an Oklahoma jury awarded Harold's $312,000.00 on the copyright infringement claim, all as actual damages, with no recovery for Dillard's profits; $21,780.00 on an Oklahoma Unfair Sales Act claim (based upon Dillard's sale in Oklahoma of some of the garments at below cost as defined by the statute); and $30,000.00 on the Oklahoma antitrust claim. (Appendix, page 54). The First Amended Judgment, entered October 5, 1994, reduced copyright damages to $260,220.00 so as to eliminate double recovery, and trebled antitrust damages to $90,000.00, for a total judgment of $372,000.00. (Appendix, page 62). On February 14, 1995, the trial court entered an Order approving Harold's Bill of Costs of $38,560.76, and awarding Harold's attorney's fees of $30,000.00 on its Oklahoma antitrust claim. (Appendix, page 68).

Prior to trial, Dillard's filed a Motion seeking dismissal of Harold's state law antitrust claim on the basis that §301(a) of the Copyright Act preempted this claim since it was based upon Dillard's copyright infringement conduct. 17 U.S.C. §301(a). The

trial court denied this Motion. (Appendix, page 40). Thereafter, the trial court denied Dillard's Motion for judgment notwithstanding the verdict. (Appendix, page 57).

Ruling on Appeal

Dillard's timely appealed the trial court's decision to the United States Court of Appeals for the Tenth Circuit, and on May 6, 1996, the Tenth Circuit denied Dillard's appeal on the basis that Dillard's "takes the wrong approach by focusing its preemption analysis on the conduct alleged to support the two causes of action." Appendix, page 15, quoting from *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 659 (4th Cir.), *cert. denied*, 114 S.Ct. 443 (1993). Instead, the Tenth Circuit compared the elements of a claim for copyright infringement with the elements of a claim for an Oklahoma antitrust violation. Appendix, pages 13-14. In this regard, the Tenth Circuit found that the elements of an Oklahoma antitrust claim required that Harold's prove that Dillard's: (1) infringed Harold's copyrights in violation of the Copyright Act, (2) in restraint of trade. *Id.* The Tenth Circuit held that this "restraint of trade" element of the Oklahoma antitrust statute supplied the "extra element" that qualitatively distinguishes an Oklahoma antitrust claim from a claim under the Copyright Act. *Id.* As such, the Court of Appeals held that §301 of the Copyright Act does not preempt the Oklahoma antitrust act. Appendix, page 14.

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions involving the proper test to be applied in determining whether §301(a) of the Copyright Act of 1976 preempts a state law cause of action arising out of the same infringing conduct. What is the proper test to be applied in determining whether §301(a) of the Copyright Act of 1076 preempts a state law claim. In a copyright infringement action, does 17 U.S.C. §301(a) of the federal Copyright Act preempt a state law cause of action based on identical conduct by the infringement defendant, or may the state law cause of action

avoid federal preemption merely by requiring an additional "element" not involving any additional or different *conduct* by the defendant?

The courts have often focused on the question of a "test" to determine whether asserted rights grounded in state law are equivalent to the rights granted by the Copyright Act. The courts test for the presence of equivalent rights by looking to the "extra element" test derived from the House Committee Report accompanying the 1976 Copyright Act. The language of §301(b), as reported out of the House and Senate Committees in the 94th Congress, included the following language:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—
>
> * * *
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, *including rights against misappropriation not equivalent to any such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices.* (emphasis added to indicate text deleted from statute as enacted).

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 24 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 21 (1975). To clarify the intent of this subsection, the Committee Reports stated:

> The examples listed in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights

> comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of "privacy," "publicity," and trade secrets, and general laws of defamation and fraud, would remain unaffected as long as the cause of action contains elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 132 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 115 (1975).

Despite the fact that the list of examples in §301(b)(3) was deleted from the bill during the debate on the floor of the House, the Courts have looked to this passage as the basis for determining whether the rights asserted under state law were equivalent to copyright.

The decision by the Court of Appeals for the Tenth Circuit in this matter is directly contrary to the law established in several other United States circuit courts of appeals. In this regard, the test for preemption under 17 U.S.C. §301(a) in the Fourth and Tenth Circuits is whether the state law cause of action has an additional element separate from that required to prove copyright infringement. This test, however, completely disregards the *conduct* of the infringement defendant. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 659 (4th Cir.), *cert. denied*, 114 S.Ct. 443 (1993) (the infringement defendant "takes the wrong approach by focusing its preemption analysis on the conduct alleged to support the two causes of action."); *see also* the decision of the Tenth Circuit hereinbelow. (Appendix, page 12).

As a result, these decisions of the Fourth and Tenth Circuits stand in direct conflict with those of the Second, Fifth, Seventh, and

Ninth circuits.[1] Indeed, the Second Circuit Court of Appeals applies the directly opposite test, to wit: that §301(a) of the Copyright Act, 17 U.S.C. §301(a), preempts state law causes of action where the facts pleaded do "not establish qualitatively different *conduct* on the part of the infringing party" (emphasis added). *Harper & Row Publishers v. Nation Enterprises*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). See also *Computer Assocs. Int'l v. Altai*, 982 F.2d 693, 717 (2d Cir. 1992) (§301 preempts state law claims grounded solely in the copying of a plaintiff's protected expression). Similarly, the Fifth Circuit holds state and federal rights to be equivalent, and therefore preempted, where "[t]he elements in plaintiff's [state law action] involve elements that would not establish qualitatively different *conduct* by the defendants than the elements for an action under the Copyright Act." (emphasis added). *Daboud v. Gibbons*, 42 F.3d 285, 33 USPQ2d 1441, 1443 (5th Cir. 1995). *See also Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663, 676-77 (7th Cir. 1986) ("Thus, a right is equivalent to one of the rights comprised by a copyright if it 'is infringed by the *mere act* of reproduction, performance, distribution or display.'" (emphasis added, citations omitted)). The Second Circuit's analysis focusing on conduct set forth in *Harper & Row, supra*, has been adopted by and is often relied upon by other courts around the country: *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984); *Quincy Cablesystems v. Sully's Bar*, 650 F.Supp. 838, 849-50 (D. Mass. 1986); and *Long v. Quality Computers and Applications*, 860 F.Supp. 191, 31 USPQ2d 1944 (M.D. Pa. 1994).

The Tenth Circuit's refusal to look to Petitioner's conduct in conducting its preemption analysis allows Petitioner to be held liable under both state and federal law — each with its own remedies — for the same acts. Thus, simply by virtue of Dillard's claimed

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[1]As set forth below, United States district courts in the First and Third Circuits have also adopted and follow these decisions focusing on the infringement defendant's conduct.

acts copyright infringement, Harold's was awarded treble damages and attorneys fees under the state antitrust law — relief to which it would not have been entitled under the Copyright Act. In fact, because Harold's did not obtain registration of its copyrights within three (3) months of their first publication or before Dillard's infringement occurred, Harold's was specifically precluded from an award of attorneys fees pursuant to the plain language of 17 U.S.C. §412.

The Tenth Circuit opinion permits circumvention of the preemption provisions of 17 U.S.C. §301(a) because the same facts or conduct of a defendant who infringes a copyright could likewise be defined or construed as being product disparagement, anticompetition, unfair trade, or any conceivable state statutory remedy. Absent preemption, the same facts may give rise to multiple theories or claims for relief and there is but a single cause of action and a single recovery. Courts have often adopted the transactional analysis of multiple claims for a multitude of purposes and have concluded that a single cause of action exists. *Aunyx Corp. v. Canon USA*, 978 F.2d 3 (1st Cir. 1992); *Burka v. New York City Transit Authority*, 32 F.3d 654 (2d Cir. 1994); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987); *Threshermen's Mut. Ins. Co. v. Wallingford Mut. Ins. Co.*, 26 F.3d 776 (7th Cir. 1994); and *Int. Unions of Operating Engneers-Employers Const. Industry Pension, Welfare and Training Trust Funds v. Karr*, 994 F.2d 1426 (9th Cir. 1993). Under the preemption doctrine, however, the same transaction, conduct, or nucleus of facts cannot give rise to either multiple claims for relief or multiple causes of action because multiple theories have been specifically preempted by federal law.

The preemption language of 17 U.S.C. §301(a) broadly covers ". . . all legal or equitable rights that are equivalent to . . ." the copyright infringement claim for relief. Consequently, if a copyright owner elects to seek protection under 17 U.S.C. §301(a), he must forego all other theories of recovery, claims or causes of action which arise out of the same facts creating the copyright

infringement. Because the Tenth Circuit failed to analyze the *conduct* of the defendant, under its ruling, defendants could be subjected to as many causes of action as creative minds can create "extra element[s]" for as referred to by the Tenth Circuit. Therefore, under the Tenth Circuit opinion, simply by changing the definition, the same conduct of the defendant could give rise to multiple causes of action, thereby rendering the preemption language meaningless.

Accordingly, it can be seen that the circuit courts of appeal are in direct conflict on this issue. The question of whether an infringement defendant's conduct should be relevant in determining whether the Copyright Act of 1976 preempts a state law cause of action is a question that has received conflicting answers from the courts of appeals. As such, it is appropriate that the Supreme Court grant the instant petition for a writ of certiorari to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be GRANTED.

Respectfully submitted,

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August 5, 1996

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HAROLDS STORES, INC.; CMT ENTERPRISES, INC.,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 95-6133
DILLARD DEPARTMENT STORES, INC.,	)	
Defendant-Appellant.	)	

HAROLDS STORES, INC.,	)	
Plaintiff-Cross-Appellant,	)	
v.	)	No. 95-6160
DILLARD DEPARTMENT STORES, INC.,	)	
Defendant-Cross-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CV-93-1212-R)

D. Kent Meyers, (Mack J. Morgan III and Joseph J. Ferretti with him on the brief), Crowe & Dunlevy, Oklahoma City, Oklahoma,

for Plaintiffs-Appellees/ Cross-Appellant,

Terry W. Tippens, (Thomas J. Enis, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, Simor L. Moskowitz, Jacobson, Price, Holman & Stern, Washington, D.C., with him on the brief), Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, for Defendant-Appellant/Cross-Appellee.

Before ANDERSON, TACRA, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

This appeal arises from a jury verdict entered in a copyright infringement action. Plaintiffs Harold's Stores, Inc. ("Harold's") and CMT Enterprises, Inc. ("CMT") filed suit against Defendant Dillard Department Stores, Inc. ("Dillard")[1] alleging that Dillard infringed Harold's copyrighted fabric designs contained on women's garments, predominately skirts. Harold's also asserted that Dillard violated the Oklahoma Antitrust Act and the Oklahoma Unfair Sales Act. A jury returned a verdict for Harold's state antitrust claim, the district court erroneously admitted consumer survey evidence, and that it was entitled to judgment as a matter of law after trial. Harold's cross-appeals the district court's rulings on its motions for attorneys' fees and denial of its motion for a permanent injunction.

I.

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[1]Harold's Stores, Inc. and CMT Enterprises, Inc. jointly filed Copyright infringement claims against Dillard. Harold's Stores, Inc. alone, however, asserted claims against Dillard under the Oklahoma Antitrust Act and the Oklahoma Unfair Sales Act. This, references in this opinion to "Harold's" regarding the copyright infringement claims include CMT Enterprises, Inc., while references to "Harold's" in relation to the Oklahoma state law claims do not.

A.

Dillard is a retail department store, operating 218 stores in 17 states. Harold's is a retail clothing store with 22 stores in 7 states, including 6 in Oklahoma and 7 in Texas. Women's clothing forms the majority of Harold's business. With the assistance of CMT, a garment manufacturer, Harold's designs and manufactures private label women's clothing, including skirts, that feature original print fabric designs. Harold's annually develops 70 to 80 print fabrics from original art that it purchases from art studios in Italy and New York. Garments made from the original print fabrics comprise 56% of Harold's skirt sales, and 40% of Harold's overall sportswear sales. Harold's represents to its customers that the original unique custom-printed fabric designs in skirts and other sportswear that are not available from Harold's competitors, including Dillard.

B.

On May 10, 1993, Rebecca Casey, C.E.O. of Harold's, received information that Dillard stores in Norman and Tulsa, Oklahoma were offering for sale skirts with print fabric patterns identical to print skirts that Harold's had sold during the previous 1991 to 1992 sales season. Ms. Casey dispatched two employees to Dillard store to investigate. The employees returned with "sacks of garments" purchased at Dillard that upon first examination appeared identical to print skirts that Harold's had developed from original art and offered for sale at $78.00 to $80.00 apiece the year before. The Dillard skirts were priced at $28.00 to $30.00. Over the next few days, Harold's personnel discovered skirts substantially similar to Harold's own offered for sale in 26 different Dillard stores.

On May 12, 1993, Harold's sent a demand letter to Dillard claiming that Dillard had infringed Harold's copyright print fabrics and requesting Dillard to remove the merchandise from its stores. Dillard did not remove the garments at issue from its stores.

C.

Harold's filed its original complaint on July 8, 1993, claiming violations of the Copyright Act, the Oklahoma Antitrust Act, and the Oklahoma Unfair Sales Act. Harold's sought preliminary and permanent injunctive relief and damages. On July 21, 1993 Dillard reduced the price of the skirts from $28.00 or $30.00 to $12.00 or $12.25, a 59% mark down that set the price below cost. During discovery, Harold's learned that Dillard buyers had arranged for the manufacture of the print skirts at issue from two separate sources: Cannontex and Wadesboro Manufacturing Company. Two different Dillard merchandise managers instructed Cannontex to manufacture skirts using Harold's skirts as "inspiration".[2] One of the merchandise managers purchased skirts from Harold's so that Cannontex could copy the print fabric designs and styles. The skirts obtained from Wadesboro were made from fabric similar or identical to fabric used by CMT to manufacture skirts for Harold's. On August 17, 1993, prior to hearing on Harold's motion for a preliminary induction, Dillard agreed that it would not sell the print skirts in markets where Harold's and Dillard competed, but that Dillard could sell the garments in markets where Harold's did not have stores.

Dillard and Harold's hotly contested the pretrial litigation, and Dillard filed at least six motions for partial summary judgment, a motion to dismiss, and several motions to reconsider. As relevant to this appeal, Dillard moved for partial summary judgment on the grounds that § 301 of the Copyright Act preempted Harold's claim under the Oklahoma Antitrust Act, Okla. Stat. tit. 79, § 1. The district court denied Dillard's motion for partial summary judgment, ruling that the Copyright Act did not preempt Harold's claim under the Oklahoma Antitrust Act because the state law claim was

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[2]Designers in the fashion industry commonly use other manufacturer's garments for inspiration in the product development process. Industry practice, however, requires that derivative designs vary from the patters used for inspiration to avoid copyright infringement. Aplt. App. at 1752, 1820, 2234-35.

qualitatively different from, and not subsumed by a federal claim for copyright infringement.

Prior to trial, Dillard stipulated that it had infringed 19 of Harold's copyrighted print fabrics. Dillard offered for sale a total of 22, 000 garments manufactured using Harold's copyrighted print fabric designs, and placed advance orders for 15, 000 more. Thus, Dillard offered for sale or had ordered a total of 37,000 garments which infringed Harold's copyrights.

The district court conducted a six-day jury trial on Harold's damages claims. To establish it damages, Harold's submitted opinion testimony from Dr. Donald Murry and Dr. Daniel Howard. Dr. Murry, an economics professor from the University of Oklahoma, testified that Dillard's infringement of Harold's copyrights and offering skirts for sale below cost in violation of the Oklahoma Unfair Sales Act amounted to unreasonable acts in restraint of trade under the Oklahoma Antitrust Act.

Dr. Howard, a marketing professor from Southern Methodist University ("SMU"), estimated Harold's damages. Based on the results of a survey of college-aged women who visited a Harold's store or examined a Harold's catalog and visited a Dillard store during the relevant time, Dr. Howard calculated the damages Harold's suffered nationwide due to Dillard's infringement of Harold's copyrights, and the damages Harold's suffered in Oklahoma on the Oklahoma Antitrust Act and Oklahoma Unfair Sales Act claims. Over Dillard's motion in limine and objections, the district court admitted Dr. Howard's survey, report, and testimony.

At the close of evidence, the district court denied Dillard's motion for judgment as a matter of law. The jury returned a verdict in favor of Harold's on all three claims on May 16, 1994. The jury awarded Harold's and CMT $312,000.00 jointly as actual damages on the copyright infringement claim, and awarded Harold's individually $21,780.00 on the Oklahoma Unfair Sales Act claim

and $30,000.00 on the Oklahoma Antitrust Act claim. The district court entered the judgment on the docket on May 17, 1994, but did not address Harold's remaining claim for a permanent injunction. Later, the district court amended the judgment and reduced the copyright damages to $ 260,220.00 to eliminate double recovery, and trebled the antitrust damage award to $90,000.00, for a total judgment of $372,000.00.

Dillard filed a renewal motion for judgment as a matter of law after trial which the district court denied on September 2, 1994. On August 31, 1994 the district court denied Harold's motion under Fed. R. Civ. P.37 for attorney's fees and expenses incurred in proving that William Dillard made certain statements reported in the Dallas Morning News that Dillard had denied Mr. Dillard made during discovery. On September 30, 1994, Harold's filed an untimely motion to amend the judgment under Fed. R. Civ.P. 59(e) and requested a permanent injunction. The district court denied Harold's request for a permanent injunction on February 14, 1995 and awarded Harold's $30,000.00 in attorney's fees on its Oklahoma Antitrust Act claim.

D.

Both parties appealed. Dillard contends the district court erred by: (1) concluding that § 301 of the Copyright Act did not preempt Harold's Oklahoma Antitrust claim; (2) admitting Dr. Howard's survey; and (3) denying its renewal motion for judgment as a matter of law after trial.[3] Harold's argues the district court

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[3] Dillard also contends the district court erred because "Harold's copyright damage claims based on its unrecovered and Dillard's avoided development cost lack foundation." Aplt.Br.at 28. We decline to address this argument, however, because Dillard failed to identify in its opening brief where it raised this argument before the district court. In this circuit, litigants are required to identify "in their initial briefs... with respect to each issue raised on appeal, a statement as to where in the record the issue was raised and ruled upon." 10th Cir. R. 28.2(b); *see also* 10th Cir. R. 28.2(c) (Whenever an "appeal is based upon a

erred by: (1) failing to award Harold's reasonable attorney's fees on its Oklahoma Antitrust Act claim; (2) failing to award Harold's attorneys' fees and expenses incurred under Fed. R. Civ.P. 37 in proving that William Dillard made certain statements reported in a newspaper that Dillard denied in discovery; and (3) denying Harold's motion for a permanent injunction.

II.

As an initial matter, we must examine our jurisdiction over this appeal. Dillard filed its notice of appeal on March 16, 1995, 30 days after February 14, 1995 order denying Harold's request for a permanent injunction, but 190 days after the district court denied

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failure to admit or exclude evidence, or the giving or refusal to give a particular jury instruction, or any other act or ruling for which a party must record an objection to preserve the right to appeal, [the party must include in the initial brief] a statement as to where a proper objection and the court's ruling thereon may be found in the record."). We may refuse to review alleged error if the party seeking review fails "to include and reference the portion of the record wherein their objection and the district court's ruling thereon may be found." *Jetcraft Corp. v. Flight Safety Int'l*, 16 F.3d 362, 366 (10th Cir. 1993).

The record on appeal in this case constitutes eight volumes. We decline to sift though over 2500 pages of information, including the transcript of a six-day jury trial, six partial motions for summary judgment, and several motions for reconsideration to find support for Dillard's argument. *See Securities and Exch. Comm'n v. Thomas*, 965 F.2d 825, 827 (10th Cir 1992) (appellant bears burden to provide court with essential references to record to carry its burden of proving error); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1513-14 (10th Cir. 1990) (where record is voluminous, it is imperative that appellant provide specific references to record). Thus, we do not consider Dillard's argument on this issue.

Finally, we note that Dillard failed to specifically identify where in the record the majority of issues presented in its opening brief were raised and ruled upon. Given the numerous dispositive motions filed during the pendency of this litigation in the district court, Dillard's failure to abide by the requirements of 10th Cir. R. 28.2(b), (c) greatly complicated our resolution of this appeal. We admonish Dillard that it risks summary dismissal of its appeal when it fails to provide this court with *specific* citations to the record in support of each allegation of reversible error.

Dillard's renewal motion for judgment as a matter of law on September 2, 1994. Harold's filed a notice of its cross-appeal on march 29, 1995, within fourteen days of Dillard's March 16, 1995 notice of appeal pursuant to Fed. R. App.P.4(a)(3).

On May 3, 1995, Harold's filed a motion to dismiss Dillard's appeal, (as well as Harold's subsequent cross-appeal), for lack of jurisdiction. According to Harold's, we lack jurisdiction to entertain these appeals because Dillard failed to file its notice of appeal within 30 days of the district court's September 2, 1994 order denying Dillard's renewal motion for judgment as a matter of law as required by Fed. R. App.P.4(a)(4). Harold's contends that Dillard's notice of appeal—filed 190 days after September 2, 1994 order—was fully 160 days out of time, and hence ineffective to confer appellate jurisdiction.

Dillard asserts that the March 16, 1995 notice of appeal was timely because the district court's September 2, 1994 order denying the renewal motion for judgment as matter of law did not constitute a final decision within the meaning of 28 U.S.C. §1291. Dillard argues that the September 2, 1994 order (and the underlying May 17, 1994 judgment) did not become final until the district court disposed of Harold's remaining claim for a permanent injunction on February 14, 1995. Consequently, Dillard maintains that it timely field its notice of appeal on march 16, 1995 within the 30 day period prescribed by Fed. R. App. P.4(a)

We may address the merits of a lawsuit only if it satisfies the requirements for appellate jurisdiction set forth in 28 U.S.C §1291. *E.g., Albright v. UNUM Life Ins. Co. of America*, 59 F.3d 1089, 1092 (10th Cir. 1995). Section 1291 grants jurisdiction to the courts of appeals to review "all final decisions of the district courts of the Untied States." A final decision is one that fully resolves all claims of relief. *E.g., Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). Orders that leave the "assessment of damages or *awarding of other relief* . . . to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. §1291."

Id. (emphasis added); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945) (A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *Albright*, 59 F.3d at 1092. Under Fed. R. Civ. P.54(b), "any order or other form of decision, however designated, which adjudicates fewer that all the claims or the rights and liability of fewer than all the parties shall not terminate the action as to any of the claims or parties" for purposes of appeal. *See id.* An order that adjudicates fewer than all the claims raised is not final, appealable decision unless the district court certified it under Rule 54(b). *Id.*; *Atiya v. Salt Lake County*, 988 F.2d 1013, 1016 (10th Cir. 1993). This, a district court order that resolves claims for damages presented to a jury at trial but fails to dispose of a claim for injunctive relief before the district court does not constitute an appealable final decision within the meaning of 28 U.S.C. §1291. *See Palmetto State Medical Center, Inc. v. Operation Rescue*, No. 90-2688, 1994 WL 468123, at **2 (4th Cir. August 31, 1994) (ruling that a directed verdict entered on claims presented to a jury was not a final appealable order under §1291 where court failed to resolve remaining claim for injunctive relief) (unpublished).

In the instant case, Harold's third amended complaint sought a permanent injunction and damages. At trial the jury only considered Dillard's claims for damages. Neither the May 17, 1994 judgment entered on the jury verdict, nor the district court's September 2, 1994 order resolved Harold's claim for a permanent injunction. Consequently, Harold's claim for a permanent injunction remained outstanding after September 2, 1994. The district court did not resolve Harold's claim for a permanent injunction until February 14, 1995 when it entered the order denying Harold's motion to amend the judgment to provide for a permanent injunction. Simply put, the September 2, 1994 order denying Dillard's renewal motion for judgment as a matter of law did not become an appealable final decision under 28 U.S.C. §1291 until the district court denied Harold's claim for permanent injunction on February 14, 1995. *E.g., Liberty Mutual Ins. Co.*, 424 U.S. at 744; *Atiya*, 988 F.2d at 1016; *Palmetto*, 1994 WL

468123 at **2. Thus, the thirty-day period prescribed by Fed. R. App.P.4(a)(1), (4) for Dillard to file its notice of appeal began to run on February 14, 1995. Dillard filed its notice of appeal on March 16, 1995, thirty days later. Consequently, we have jurisdiction over these appeals under 28 U.S.C. §1291. We therefore deny Harold's motion to dismiss the appeals for lace of jurisdiction.

III.

Turning to the merits, Dillard first contends the district court erred by concluding that §301 of the Copyright Act did not preempt Harold's Oklahoma Antitrust Act claim. Dillard argues that §301 preempted the Oklahoma Antitrust Act claim because Harold's state antitrust claim relied on the same activities and predicate act as did the federal copyright claim, *i.e.*, copyright infringement. Consequently, Dillard maintains the district court erred in denying its motion for partial summary judgment based on federal copyright preemption of Harold's state antitrust claim.

We review the district court's ruling on summary judgment de novo, viewing the record in the light most favorable to the nonmoving party. *Ball v. Renner*, 54 F.3d 664, 665 (10th Cir. 1995). Summary judgment is appropriate only if there are no genuinely disputed material issues of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Whether §301 of the Copyright Act preempts a state law claim presents a question of law that we review de novo on appeal. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 658 (4th Cir.), *cert. denied*, 114 S.Ct. 443 (1993).

Section 301 of the Copyright Act preempts enforcement of any state cause of action which is equivalent in substance to a

federal copyright infringement claim.[4] More specifically, §301 preempts a state common law or statutory claim if: "(1) the work is within the scope of the subject matter of copyright as specified in 17 U.S.C. §§ 102 and 103; and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. §106." *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 847 (10th Cir. 1993) (quotations and citations omitted); *accord Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1164 (1st Cir. 1994); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 229 (4th Cir. 1993).

Harold's does not dispute that the print fabrics at issue fall

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[4]Section 301(a) provides:

> (a) On and after January 1, 1978, *all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106* in works or authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . *are governed exclusively by this title*. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. §301(a) (emphasis added). Section 301(b) limits §301(a), and provides in relevant part:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statues or any State with respect to—
>
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 . . . or
>
> . . . .
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

17 U.S.C. § 301(b).

within the "subject matter of copyright as specified in 17 U.S.C. §§ 102 and 103." Thus, we must determine whether the rights granted by the Oklahoma Antitrust Act, Okla. Stat. tit. 79, §1, the legal basis of Harold's state antitrust claim, are equivalent to any of the exclusive rights granted by §106 of the Copyright Act. *See Gates Rubber Co.*, 9 F.3d at 847. Section 106 of the Copyright Act grants to the copyright owner the exclusive rights to: (1) reproduce the copyrighted work; (2) prepare derivative works; (3) distribute copies of the work; (4) perform the work publicly; and (5) display the work publicly. 17 U.S.C. §106. "Section 301 preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law." *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (quotations omitted).

Harold's based its Oklahoma Antitrust Act claim on Dillard's copyright infringement of the print fabric skirts and sportswear. Specifically, Harold's alleged in its third amended complaint that Dillard's copyright infringement constituted an act in restraint of trade in violation of the Oklahoma Antitrust Act, Okla. Stat. tit. 79, §1. Because Harold's Oklahoma Antitrust Act claim was premised on the same conduct as the copyright infringement claim, Dillard asserts that §301 of the Copyright Act preempts Harold's state law antitrust claim. Dillard, however, "takes the wrong approach by focusing its preemption analysis on the conduct alleged to support the two causes of action." *Trandes Corp.*, 996 F.2d at 659. In order to determine whether Harold's Oklahoma Antitrust Act claim asserts rights equivalent to those specified in §106 of the Copyright Act—and is thereby preempted by §301—we compare the elements of the causes of action, not the acts pled to prove them. *Gates Rubber Co.*, 9 F.3d at 847; *Rosciszewski*, 1 F.3d at 229; *Trandes Corp.*, 996 F.2d at 659. "[I]f a state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action." *Gates Rubber Co.*, 9 F.3d at 847

(citing *Computer Assocs. Int'l*, 982 F.2d at 716); *see also Rosciszewski*, 1 F.3d at 229-30 (noting that "the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim") (quotations and citations omitted). Hence, to correctly analyze Dillard's copyright preemption argument using the "extra element" test, we must compare the elements of a claim for copyright infringement to the elements of a claim for an Oklahoma Antitrust violation.

To prove copyright infringement under the Copyright Act, a plaintiff must show: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 361 (1991). To prove a violation of the Oklahoma Antitrust Act, a plaintiff must establish that the defendant committed: (1) an act, (2) in restraint of trade. Okla. Stat. tit. 79, §1,[5] *see generally Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n*, 561 P.2d 499, 505-06 (Okla. 1977) (discussing Oklahoma Antitrust Act). An act restrains trade under Okla. Stat. tit. 79, §1 if it "prejudice[s] public interests by unduly restricting competition, or unduly obstruct[s] the due course of trade, or . . . injuriously restrain[s] trade." *Crown Paint Co. v. Bankston*, 640 P.2d 948, 950 (Okla. 1981), *cert. denied*, 455 U.S. 946 (1982).

Applying these principles to the instant case, the elements of an Oklahoma Antitrust Act claim require Harold's to prove that Dillard's: (1) infringed Harold's copyrights in violation of the Copyright Act, (2) in restraint of trade. Okla. Stat. tit. 79, §1. To

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[5]The Oklahoma Antitrust Act provides in relevant part:

> **§ 1. Trust in restraint of trade illegal**
>
> Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

Okla. Stat. tit. 79, § 1.

satisfy the restraint of trade element, Harold's must demonstrate that Dillard's copyright infringement "prejudice[d] public interests by unduly restricting competition, or unduly obstruct[ed] the due course of trade, or . . . injuriously restrain[ed] trade." *Crown Paint Co.*, 640 P.2d at 950. The "restraint of trade" element of Okla. Stat. tit. 79, §1 supplies the "extra element" that qualitatively distinguishes an Oklahoma Antitrust Act claim from a claim for copyright infringement under the Copyright Act. That is, the restraint of trade component of an Oklahoma Antitrust Act claim requires a litigant claiming a violation of Okla. Stat. tit. 79, §1 to establish proof beyond that required to demonstrate a violation of the exclusive rights protected by §106 of the Copyright Act, *i.e.*, copying, preparation of derivative works, performance, distribution or display. *See Gates Rubber Co.*, 9 F.3d at 847; *Rosciszewski*, 1 F.3d at 229-30. Because Harold's Oklahoma Antitrust Act claim requires proof of an extra element separate from that required for Harold's copyright infringement claim, we hold that §301 of the Copyright Act does not preempt the Oklahoma Antitrust Act, Okla. Stat. tit. 79, §1. Consequently, the district court did not err in denying Dillard's motion for partial summary judgment based on federal copyright preemption of Harold's Oklahoma Antitrust Act claim.

IV.

Next, Dillard contends the district erred in admitting Dr. Howard's survey. Dillard argues the district court abused its discretion in admitting the survey because: (1) Dr.Howard failed to survey a relevant universe of consumers, and (2) the survey was not material or probative to establish copyright damages.

We allow the admission of survey evidence "as an exception to the hearsay rule if the survey is material, more probative on the issue than other evidence and if it has guarantees of trustworthiness." *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 522 (10th Cir. 1987) (citing Fed. R. Evid. 803(24)); *see also* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence*

¶901(b)(9)[03] at 901-140 (1995) ("The admissibility of survey or sampling results depends upon two factors: necessity and trustworthiness."); *Manual for Complex Litigation, Third*, §21.493 at 101 (1995) ("In some cases, sampling techniques may provide the only practicable means to collect and present relevant data."). "A survey is trustworthy if it is shown to have been conducted according to generally accepted survey principles." *Brunswick Corp.*, 832 F.2d at 522; *accord Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988), *cert. denied sub nom.*, 493 U.S. 813 (1989).

The survey should sample an adequate or proper universe of respondents. *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 507 (5th Cir. 1980). "[T]hat is, the persons interviewed must adequately represent the opinions which are relevant to the litigation." *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980). The district court should exclude the survey "when the sample is clearly not representative of the universe it is intended to reflect." *Bank of Utah v. Commercial Sec. Bank*, 369 F.2d 19, 27 (10th Cir. 1966), *cert, denied*, 386 U.S. 1018 (1967). Technical and methodological deficiencies in the survey, including the sufficiency of the universe sampled, bear on the weight of the evidence, not the survey's admissibility. *Brunswick*, 832 F.2d at 523 & n.6; *Keith*, 858 F.2d at 480; *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 844-45 & n.24 (11th Cir. 1983). We review the district court's admission of a survey for an abuse of discretion. *Brunswick*, 832 F.2d at 522.

At trial, Harold's claimed that Dillard's sale in 1993 of copyrighted skirts that Harold's sold in 1991 and 1992 injured Harold's reputation and goodwill, and damaged Harold's relations and future sales with present and prospective customers.[6] Harold's

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[6]Harold's stipulated that Dillard's sale of the infringing garments did not deprive Harold's of any sales of the copyrighted print fabric skirts. Harold's sold the print fabric skirts infringed by Dillard only in 1991 and 1992; Dillard did not offer the infringing garments for sale until 1993. Aplt. App. at 1083.

retained Dr. Howard to offer opinion testimony in support of Harold's damages claims. As a basis for his testimony, Dr. Howard surveyed 1,231 female undergraduates at SMU in October 1993 using a single-page survey. The complete survey is set forth in the margin.[7] 578 of the 1,231 respondents reported that they had visited a Harold's store or looked at a Harold's catalog and visited a Dillard store during the relevant time periods. Dr. Howard used the universe of female undergraduates who were exposed to both Harold's and Dillard during the times at issue to "determine whether, and to what degree, Dillard's sale of Harold's copyrighted fabric designs inflicted damages to future sales of women's and men's clothing by Harold's." Aplee. Supp. App. at 2441, 2472.

Dillard maintains the district court abused its discretion in

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[7] Shopping Survey

Instructions: Please respond to the following questions by placing a "X" in the space that *most closely reflects* your memories and your feelings about the issued addressed.

(1) Have you visited a Harold's store or looked at a Harold's catalog in the past two years (in 1991 or 1992)?
___yes ___no ___unsure

(2) Did you visit a Dillard's department store from May to August of this year (1993)?
___yes ___no ___unsure

CONTINUE THE SURVEY ONLY IF YOU ANSWERED "YES" TO #1 AND #2

(3) On any of your recent visits to Dillard's, have you seen any print skirts with patterns you thought of as being *unique* to Harold's?
___yes ___no ___unsure

(4) On any of your recent visits to Dillard's, have you seen any women's purses with designs you though as being *unique* to Harold's?
___yes ___no ___unsure

(5) How likely or unlikely is it that you will purchase clothes from Harold's within the next year?
very likely ___:___:___:___:___:___:___ very unlikely

(6) Is this the first time you have answered these questions?
___yes ___no ___unsure

Aplee. Supp. App. at 2496.

admitting the survey because the group surveyed was too narrow. Dillard argues that because Dr. Howard surveyed only female undergraduates at SMU, and from their responses extrapolated damages for all consumers that potentially would shop at a Harold's store, the survey was fatally flawed. According to Dillard, the proper universe encompasses "Harold's overall customers." Aplt. Reply Br. at 2 1.

On this record, we cannot conclude the district court abused its discretion in admitting the survey. The district court conducted an extensive voir dire of Dr. Howard and satisfied itself that the survey was material, probative to the issue of copyright infringement damages, and conducted according to generally accepted survey principles. Aplt. App. at 1913-34. The record also reflects that Harold's laid an adequate foundation to admit the survey. Dr. Howard testified that he conducted the survey according to generally accepted survey principles. Aplt. App. at 1941-60. *See Keith*, 858 F.2d at 481 ("The testimony of the survey director alone is sufficient to establish a foundation.").

We also conclude that Dr. Howard surveyed an adequate universe of respondents. Ms. Casey, CEO of Harold's, testified that college-aged women represent a critically important group to Harold's overall sales. Ms. Casey also testified that Harold's first store was located on a college campus and that Harold's intentionally locates its stores near college campuses to target the college market, primarily undergraduate women. Ms. Casey observed that in her view, the buying patterns of college-age women are "identical to our older customers." Aplt. App. at 1676. Testimony before the district court also established that purchasing patterns, consumer preferences, and the demand for Harold's products were similar for all Harold's stores, regardless of geographic location. Aplt. App. at 1953.

Because testimony before the district court established that college-age women comprise Harold's core customer base, this survey does not amount to an instance "when the sample is clearly

not representative of the universe it is intended to reflect." *Bank of Utah*, 369 F.2d at 27. Instead, the record demonstrates that the universe of college-age women who had visited a Dillard store and either visited a Harold's store or looked at a Harold's catalog during the relevant time periods "represent the opinions which are relevant to the litigation." *Amstar*, 615 F.2d at 264. That is, the survey respondents' opinions are probative on the issue of whether and to what degree Dillard's infringement and sale of Harold's copyrighted fabric designs damaged Harold's future clothing sales.[8] Thus, Dillard's contention that the survey was not probative or material to the issue of copyright infringement damages fails.

In sum, we hold the district court did not abuse its discretion in admitting the survey because Dr. Howard surveyed an adequate universe of respondents according to generally accepted survey principles. Consequently, any technical or methodological deficiencies in the manner in which Dr. Howard conducted the survey bear on the weight—not the admissibility—of the survey.[9]

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[8]*See also Brunswick*, 832 F.2d at 523 n.6 (holding that universe of persons over 14 years old who had fished in freshwater during previous 12 months sampled persons likely to purchase fishing reels and was therefore probative to likelihood of confusion in trademark infringement action between two fishing reel manufacturers); *Jellibeans*, 716 F.2d at 845 n.24 (ruling that universe of persons between ages 12 and 24 who had roller-skated in the last year was adequate survey sample and probative of actual confusion in deceptive trade practice action between two roller rink operators); *Amstar Corp.*, 615 F.2d at 264 (ruling that universe of women found at home during daylight hours was inadequate survey universe in trademark infringement action by maker of Domino Sugar against Domino's Pizza because the survey "neglected completely defendants' primary customer—young, single, male college students").

[9]Because deficiencies in the survey bear on the weight and not the admissibility of the evidence, *Brunswick*, 832 F.2d at 523, we reject Dillard's contentions that technical or methodological defects in the survey rendered it inadmissible. Specifically, we reject Dillard's arguments that: (1) question four on the survey—the **"filter"** question—rendered the survey inadmissible; (2) the survey was fatally flawed because it did not mimic market conditions; (3) the survey was inadmissible because it did not refer to the copyrighted fabric designs; and (4) the survey questions were slanted, leading, and ambiguous.

E.g., Brunswick, 832 F.2d at 523 & n.6. We therefore reject Dillard's argument that the district court erred in admitting the survey because the survey respondents did not encompass "Harold's overall customers" and because the survey was, according to Dillard, not material or probative.

V.

Next, Dillard contends the district court erred in denying its Fed. R. Civ. P. 50(b) renewal motion for judgment as a matter of law after trial. Dillard argues it was entitled to judgment as a matter of law because: (1) the evidence was insufficient to support the copyright damages award; (2) Harold's failed to establish that Dillard violated the Oklahoma Antitrust Act; and (3) Harold's did not demonstrate that Dillard violated the Oklahoma Unfair Sales Act.

We review the district court's denial of a renewal motion for judgment as a matter of law de novo, applying the same standards as the district court. *Lyon Dev. Co, v. Business Men's Assurance Co. of America*, 76 F.3d 1118, 1122 (10th Cir. 1996). We must affirm, viewing the record in the light most favorable to Harold's, there is evidence upon which the jury could properly return a verdict for Harold's. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 962 (10th Cir. 1994), *cert. denied sub nom.*, 115 S.Ct. 2600 (1995). We do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that of the jury. *Magnum Foods, Inc., v. Continental Casually Co.*, 36 F.3d 1491, 1503 (10th Cir. 1994). However, we must enter judgment as a matter of law in favor of the moving party if "there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law." Fed. R. Civ. P. 50(a); *see also SCFC ILC. Inc.*, 36 F.3d at 962. With these principles in mind, we examine Dillard's contentions in turn.

A.

Dillard first maintains the district court erred in denying its Rule 50(b) renewal motion for judgment as a matter of law because the evidence was insufficient to support the copyright damages award. Dillard contends that the survey evidence attested to by Dr. Howard did not provide reliable evidence of present or future reduced sales revenue as a result of reduced purchase intentions.

We first note that Ms. Casey, CEO of Harold's, testified without objection that Dillard's infringement of Harold's copyrighted print skirts damaged Harold's goodwill. Ms. Casey estimated that Dillard's copyright infringement injured Harold's goodwill in the range of $225,000.00 to $500,000.00. Aplt. App. at 1748. A corporate officer familiar with company history, financial statements, and customer relations may offer opinion testimony as to the extent the company sustains damages to its goodwill. *Rainbow Travel Serv. v. Hilton Hotels Corp.*, 896 F.2d 1233, 1239 (10th Cir. 1990) (rejecting sufficiency of the evidence challenge to jury verdict of $37,500.00 in damages to goodwill where company president had testified that company suffered injury to goodwill in the amount of $250,000.00).

Harold's offered opinion testimony from Dr. Howard in support of its copyright infringement damages claims. Dr. Howard based his damages estimates on the survey. Of the universe of undergraduate women who had visited a Dillard store in 1993, (when Dillard offered the infringing skirts for sale), and visited a Harold's store or looked at a Harold's catalog in 1991 or 1992, Dr. Howard testified that the survey detected a reduced future purchase intention by respondents who saw print skirts at Dillard that they thought were unique to Harold's. Specifically, Dr. Howard testified that women who saw the infringing skirts at Dillard were somewhat unlikely to purchase clothes from Harold's within the next year. Aplt. App. at 1976-77. In contrast, women who visited both stores but did not see skirts they thought of as unique to Harold's were, on the whole, fairly likely to shop at Harold's in the

future. Dr. Howard reported that the women who saw the garments at issue at Dillard were 33.1% less likely to purchase garments at Harold's than women who visited both stores at the relevant time but did not view the infringing skirts. *Id.* at . 1977-78.

Dr. Howard analyzed the survey data and estimated the damages Harold's suffered nationwide from Dillard's copyright infringement. Dr. Howard testified that Harold's suffered damages to goodwill, reputation, and sales to future and prospective customers in the range of $226,367.00 to $517,809.00. Aplee. Supp. App. at 2491; Aplt. App. at 1988-99.

Based on this evidence, the jury awarded Harold's and CMT actual damages of $312,000.00 on the copyright infringement claim.[10] Viewing the evidence in the light most favorable to Harold's and drawing all reasonable inferences therefrom, *SCFC ILC, Inc.*, 36 F.3d at 962, we conclude there was substantial evidence tending to support the jury's damages award on Harold's copyright infringement claim.

B.

Dillard next contends the district court erred in denying its Rule 50(b) renewal motion for judgment as a matter of law on Harold's Oklahoma Antitrust Act claim. Dillard asserts it was entitled to judgment as a matter of law on the state antitrust claim because: (1) Harold's failed to prove Dillard unreasonably restrained trade; (2) the Oklahoma Antitrust Act requires proof of concerted action, not unilateral conduct; and (3) there evidence was insufficient to support the damages award.[11]

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[10]The district court later reduced the copyright damages to $260,220.00 to eliminate double recovery.

[11]Dillard also argues the district court erred in denying its Rule 50(b) motion on the state antitrust claim because Harold's failed to establish proof of a relevant market. Aplt. Br. at 36. We do not address this issue because Dillard

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Dillard argues that Harold's failed to prove that Dillard unreasonably restrained trade. At trial, Harold's contended that Dillard violated the Oklahoma Antitrust Act, Okla. Stat. tit. 79, §1, by infringing Harold's garments in violation of the Copyright Act, and offering the infringing garments for sale below cost in violation of the Oklahoma Unfair Sales Act. On appeal, Dillard contends that Harold's did not show injury to competition in general—as required for an antitrust violation—but merely established that Dillard injured Harold's individually. Consequently, Dillard asserts the district court should have entered judgment as a matter of law in its favor on the state antitrust claim.

The Oklahoma Antitrust Act provides:

> § 1. **Trust in restraint of trade illegal**
>
> Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

Okla. Stat. tit. 79, §1. In interpreting the Oklahoma Antitrust Act,

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failed to raise it before the district court. Dillard filed a brief in support of its Rule 50(b) motion with the district court and argued that Harold's failed to establish "evidence of injury to competition or unreasonable restraint of trade within the state of Oklahoma." Aplt. App. at 1181. Dillard did not argue that the district court erred in submitting the antitrust claim to the jury because Harold's failed to establish a relevant market. Instead, Dillard noted that its economist, Dr. Huettner, and Harold's economist, Dr. Murry, "differed as to the number of competitors to be included in each of these markets" but "agreed that the relevant geographic markets were the Oklahoma City and Tulsa areas." 11 at 1182. Dillard argued that "even accepting Murry's narrow sub-market, there is no evidence to support injury from competition." *Id.* at 1183. Because Dillard failed to present this issue to the district court, we do not consider it on appeal. *Mick v. Brewer*, 76 F.3d 1127, 1132 n.2 (10th Cir. 1996).

the Oklahoma Supreme Court observed,

> It has long been recognized that every agreement concerning trade, and every regulation of trade, restrains trade to some extent, and that the very essence of such agreements is to bind or restrain. As a literal application of the provisions of 15 U.S.C., §1, or [Okla. Stat. tit. 79, §1] would outlaw every conceivable contract or combination which could be made concerning trade or commerce, courts have read into such statute a "rule of reason," under which only those acts, contracts, agreements, or combinations which prejudice public interest by unduly restricting competition, or unduly obstructing the due course of trade, or which injuriously restrain trade, are unlawful.

Teleco, Inc. v. Ford Indus., Inc., 587 P.2d 1360, 1362-63 (Okla. 1978); *see also Crown Paint Co.*, 640 P.2d at 950. In sum, only "unreasonable restraint of trade, as measured by the 'rule of reason'" violates Okla. Stat. tit. 79, §1. *Teleco, Inc.*, at 1363.

"The fundamental test of the reasonableness of an action, which, by its nature, restrains trade, is its effect on the public." *Kresbach v. Henley*, 725 P.2d 852, 858 (Okla. 1986) "'To amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business.'" *Id.* at 858 n.18 (quoting *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979)). That is, "'[t]he conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged.'" *Id.* An antitrust plaintiff must show that the challenged conduct adversely impacts competition in general because "'the antitrust laws . . . were enacted for the protection of competition, not competitors.'" *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477

(1977)).

At trial, Dr. Murry, economics professor at University of Oklahoma, offered opinion testimony in support of Harold's state antitrust claim. Specifically, Dr. Murry testified that by infringing Harold's copyrights and selling garments below cost in violation of the Oklahoma Unfair Sales Act, Dillard not only injured Harold's, but harmed competition in general. Aplt. App. at 1847.

> I think there are two aspects of the impact on the potential competitors and the other competitors. On the one hand, if Dillard's can bypass the development costs of creating unique fabrics of their own, they can make it harder for anyone else to compete. And in economics, we call that a barrier to entry. Even if someone is in it, it means that it's going to make it more difficult for them to compete fairly and develop their own products, because that product cost has been bypassed. . . . And then secondly, if a company, such as Dillard's in this case . . . can essentially take the intellectual property of another company, or take the copyrights . . . it doesn't just do damage to Harold's, it sends a signal to anybody else that wants to enter this market, that if you come in here, you're going to get squashed because this big company will exercise its power and take your copyrights. In that regard, in economics, we would say it raises a barrier to entry. That itself is anti-competitive. *That, in my judgement, is an unreasonable restraint of trade.*

Aplt. App. at 1847-48 (emphasis added). Dr. Murry, therefore, presented opinion testimony to the effect that Dillard's actions adversely impacted competition in general and unreasonably restrained trade. Viewing Dr. Murry's testimony in the light most favorable to Harold's as we must, *SCFC ILC, Inc.*, 36 F.3d at 962,

we conclude there was evidence upon which a jury could properly find that Dillard's actions unreasonably restrained trade by adversely impacting competition in general under the rule of reason analysis. Thus, we reject Dillard's argument that the district court should have entered judgment as a matter of law in favor of Dillard on the state antitrust claim because Harold's did not show that Dillard injured competition in general.

2.

Dillard also contends it was entitled to judgment as a matter of law on Harold's Oklahoma Antitrust Act claim because Okla. Stat. tit. 79, §1, requires proof of concerted action, not unilateral conduct. Because Harold's argued at trial that Dillard's *unilateral* acts of copyright infringement and sales below cost unreasonably restrained trade—without attempting to show Dillard acted in concert with others—Dillard contends the district court should have entered judgment as a matter of law in its favor.

To date, the Oklahoma Supreme Court has not addressed whether §1 of the Oklahoma Antitrust Act prohibits unilateral acts in restraint of trade. Thus, our duty is to determine, as best we can, how the Oklahoma Supreme Court would resolve this issue. *E.g.*, *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins, Co.*, 52 F.3d 1522, 1527 (10th Cir. 1995). We review the district court's rulings on issues of state law de novo. *Id.*

Dillard's argument requires us to interpret Okla. Stat. tit. 79, §1 using tools of statutory interpretation. In Oklahoma, "[t]he fundamental rule of statutory construction is to discern the Legislative intent." *Cox v. Dawson*, 911 P.2d 272, 276 (Okla. 1996). To ascertain legislative intent, Oklahoma courts examine the language of the pertinent statute. *Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City*, 901 P.2d 800, 803 (Okla.), *cert. denied*, 116 S. Ct. 674 (1995). The Oklahoma Statutes mandate that "[w]ords used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears."

Okla. Stat. tit. 25, §1. Thus, Oklahoma courts "presume that the Legislature intends what it expresses" in the plain language of a statute. *Oklahoma Ass'n for Equitable Taxation*, 901 P.2d at 803.

Applying these governing principles of Oklahoma statutory interpretation to §1 of the Oklahoma Antitrust Act, we conclude that the Oklahoma Legislature intended Okla. Stat. tit. 79, §1 to reach unilateral conduct. The plain language of the statute provides "[e]very act . . . in restraint of trade . . . is hereby declared to be against public policy and illegal." Okla. Stat. tit. 79, §1. The ordinary meaning of the word act "[d]enotes external manifestation of *actor's* will... something done voluntarily by *a person*." *Black's Law Dictionary* 17 (6th ed. 1991) (emphasis added). An actor is "*[o]ne* who acts." *Id.* at 22 (emphasis added). The plain language of the word "act" therefore encompasses unilateral conduct by a single entity.

Dillard argues, however, that Oklahoma courts have uniformly followed federal decisions construing §1 of the Sherman Act in interpreting §1 of the Oklahoma Antitrust Act. Consequently, Dillard asserts that §1 of the Oklahoma Antitrust Act—like §1 of the Sherman Act—does not reach unilateral conduct.

The Oklahoma Antitrust Act is "similar to federal antitrust legislation," *Oakridge Invs., Inc. v, Southern Energy Homes, Inc.*, 719 P.2d 848, 850 (Okla. 1986); *see also Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148, 1150 (Okla. 1977) ("Oklahoma [antitrust] statutes are patterned after the federal enactments being at times both cumulative and complimentary to federal legislation."). Oklahoma courts thus look to the interpretation §1 of the Sherman Act, 15 U.S.C. §1, by federal courts for "valuable assistance in interpreting the provisions of the Oklahoma statutes." *Teleco, Inc.*, 587 P.2d at 1362.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be

illegal." 15 U.S.C. §1. Because §1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade, the Supreme Court has ruled that "[i]t does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Thus, a plaintiff proceeding under §1 of the Sherman Act must prove an agreement between two or more persons to restrain trade, because §1 does not reach unilateral conduct. *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 266 (1986); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir. 1996).

Although Okla. Stat. tit. 79, §1 is "similar to federal antitrust legislation," *Oakridge Invs., Inc.*, 719 P.2d at 850, it is not identical to §1 of the Sherman Act. Significantly, Okla. Stat. tit. 79, §1 prohibits "[e]very *act* . . . in restraint of trade." *Id.* Section 1 of the Sherman Act does not prohibit "every act" in restraint of trade, but proscribes "[e]very contract, combination... or conspiracy in restraint of trade," 15 U.S.C. §1, all words that denote agreement or concerted action between at least two entities. Simply put, it takes two to tango under §1 of the Sherman Act, while the plain language of §1 of the Oklahoma Antitrust Act reaches unilateral conduct in restraint of trade.

Because the Oklahoma antitrust legislation differs from the relevant federal statute on this key point, federal authority ruling that §1 of the Sherman Act "does not reach conduct that is 'wholly unilateral,'" *Copperweld Corp.*, 467 U.S. at 768, does not govern this particular issue of Oklahoma statutory law. The difference between the federal and state antitrust legislation prevents federal decisions from providing "valuable assistance in interpreting the provisions of the Oklahoma [antitrust] statutes." *Teleco, Inc.*, 587 P.2d at 1362. Federal rulings premised on the plain language of §1 of the Sherman Act are inapposite to the significance of language in the Oklahoma statute that is absent from the federal legislation.

In sum, we must presume that the Oklahoma Legislature intended the word "act" in Okla. Stat. tit. 79, §1 to carry its

ordinary meaning of something done voluntarily by *a person*. *See* Okla. Stat. tit. 25, §1; *Oklahoma Ass'n for Equitable Taxation*, 901 P.2d at 803. As a federal court, we will not second guess the Oklahoma Legislature's decision to draft its state antitrust act to reach unilateral conduct. We therefore believe the Oklahoma Supreme Court would, applying the governing principles of statutory interpretation to the plain language of Okla. Stat. tit. 79, §1, conclude that §1 of the Oklahoma Antitrust Act prohibits unilateral conduct in restraint of trade. Accordingly, we reject Dillard's contention that it was entitled to judgment as a matter of law on Harold's Oklahoma Antitrust Act claim because Okla. Stat. tit. 79, §1, requires proof of concerted action, not unilateral conduct.

3.

Dillard next argues the district court erred in denying its motion for judgment as a matter of law because the evidence was insufficient to support the damages award on the state antitrust claim. Dillard argues that Harold's failed to provide any probative factual evidence that Harold's sustained monetary damages from an antitrust injury.

Viewing the record in the light most favorable to Harold's, we conclude substantial evidence reasonably tends to support the jury's damages award on Harold's Oklahoma Antitrust Act claim. Relying on the results of the survey, Dr. Howard testified that Harold's customers in Oklahoma which saw the infringing skirts at Dillard were somewhat unlikely to purchase clothes at Harold's in the next year. Using Harold's Oklahoma sales figures, Dr. Howard calculated that the reduced purchase intention injured goodwill in the range of $51,675.00 to $146,595.00. Aplt. App. at 353-56. Based on this testimony, the jury awarded Harold's $30,000.00 on the state antitrust claim, which the district court later trebled to $90,000.00 pursuant to Okla. Stat. tit. 79, §25. Because Dillard's infringement of Harold's print fabric skirts in Oklahoma supplied the predicate act for Harold's claim for an antitrust violation under

Okla. Stat. tit. 79, §1, we conclude that there was evidence to support the jury's damages award on the state antitrust claim.

C.

Finally, Dillard argues the district court erred in denying its Rule 50(b) renewal motion for judgment as a matter of law on Harold's Oklahoma Unfair Sales Act claim. Dillard asserts it was entitled to judgment as a matter of law on Harold's Unfair Sales Act claim because: (1) Dillard's price markdown was exempt as a bona fide clearance sale, and (2) the evidence was insufficient to support the damages award.

1.

Dillard argues that its markdown of the print skirts did not violate the Unfair Sales Act because the markdown was exempt under the Act as a bona fide clearance sale. We disagree.

Dillard initially priced the infringing skirts at $28.00 to $30.00 each. Harold's sold skirts featuring the same print fabrics for $78.00 to $80.00 the year before. On July 8, 1993 Harold's filed its complaint alleging that Dillard had infringed its copyrights. On July 21, 1993 Dillard reduced the price of the skirts from $28.00 or $30.00 to $12.00 or $12.25, a 59% mark down that set Dillard's price below cost.[12] Dillard advertised the mark down in newspapers as "Dillard's Summer Savings." Aplee. Supp. App. at 2436. At trial, Harold's argued that Dillard's below-cost sales in Oklahoma violated the Oklahoma Unfair Sales Act, Okla. Stat. tit. 15, §598.3.

The Oklahoma Unfair Sales Act defines and prohibits

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[12]Dillard stipulated that it offered the skirts for sale in Oklahoma at prices that were less than cost as defined by the Unfair Sales Act, Okla. Stat. tit. 15, §598.2(a). Aplt. App. at 1082.

"below-cost sales by retailers and wholesalers." *So-Lo Oil Co. v. Total Petroleum, Inc.*, 832 P.2d 14, 17 (Okla.1992); *see* Okla. Stat. tit. 15, §598.3.[13] The Unfair Sales Act's "two major purposes are (1) to prevent 'loss leader selling' (featured items priced below cost to entice customers into a store where other merchandise prices are inflated) and (2) to protect small merchants from large competitors capable of driving them out of business by below-cost sales." *So-Lo Oil Co.*, 832 P.2d at 17. Section 598.6(a) exempts clearance sales from the Unfair Sales Act. Okla. Stat. tit. 15, §598.6(a). Section 598.6(a) provides: "[t]he provisions of this act shall not apply to sales at retail . . . where seasonable merchandise is sold in bona fide clearance sales, *if advertised, marked, and sold as such*." *Id.* (emphasis added). The Unfair Sales Act, including the exemptions, must be strictly construed. *So-Lo Oil Co.*, 832 P.2d at 18.

Applying these principles to the instant case, we conclude that Dillard failed to demonstrate that the below-cost sales were exempted from the Unfair Sales Act. The exemption applies where a retail merchant sells seasonable merchandise in a "bona fide clearance sale[], *if advertised, marked, and sold as such*." Okla. Stat. tit. 15, §598.6(a) (emphasis added). Dillard did not advertise

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[13]Section 598.3 of the Unfair Sales Act provides:

> **§ 598.3. Sales below cost prohibited in certain cases**
>
> It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Okla. Stat. tit. 15, §598.3.

the below-cost sales as a clearance sale as required by the statutory exemption. Instead, Dillard advertised the 59% mark down of the infringing garments as "Dillard's Summer Savings." Aplee. Supp. App. at 2436. The record also reveals that Dillard conducted three clearance sales prior to or after the "Dillard's Summer Savings" sale but did not include the skirts at issue among the items marked down for clearance. *Id.* at 2434-37. In sum, because Dillard neither advertised the 59% mark down of the skirts as a clearance sale nor sold the garments during a clearance sale, the plain language of §598.6(a) does not exempt the below-cost sales from the Oklahoma Unfair Sales Act. We therefore reject Dillard's argument that the district court erred in denying its Rule 50(b) motion on Harold's Oklahoma Unfair Sales Act claim because the below-cost skirt sales constituted an exempt bona fide clearance sale.

2.

Dillard argues that there was "a total lack of any competent evidence that Harold's suffered any damages due to Dillard's sale of infringing garments below cost in Oklahoma." We disagree.

At trial, Ms. Casey testified that Harold's was damaged by Dillard's sales below costs. Specifically, Ms. Casey observed that Dillard's display and sale of print fabric skirts at $12.00 to $12.25 that Harold's had sold for $78.00 to $80.00 made "us look like we've been cheating our customer all this time." Aplt. App. at 1743. Ms. Casey testified that the below-cost sales injured Harold's reputation and goodwill because it gave "the general impression that everything in [our] store is priced unfairly." *Id.*

In accordance with Ms. Casey's testimony, Dr. Howard offered opinion testimony that Dillard's sale of the infringing garments below cost breached the trust between Harold's and its customers:

> Simply the act of observing those skirts for sale at Dillard's reduced the likelihood that they're going

> to shop at Harold's in the future. . . . Harold's basic marketing position is that you can find unique skirts here. You can find things here that you're not going to find anywhere else. And then you have a customer or potential customer who goes to Dillard's and sees precisely the same thing available for one-half to one-fourth the price, and *I believe that the customer and the potential customer would feel betrayed, if not even ripped off.*

Aplt. App. at 1979-80 (emphasis added). The jury returned a verdict of $21,780.00 in favor of Harold's on the Oklahoma Unfair Sales Act claim. Viewing the record in the light most favorable to Harold's, we conclude sufficient evidence supports the jury's verdict in favor of Harold's on its Unfair Sales Act claim.

VI.

On cross-appeal, Harold's argues the district court erred by: (1) failing to award Harold's sufficient attorneys' fees on its Oklahoma Antitrust Act claim; (2) refusing to award Harold's attorneys' fees and expenses incurred under Fed. R. Civ. P. 37 in proving that William Dillard made certain statements reported in a newspaper that Dillard denied in discovery; and (3) denying Harold's motion for a permanent injunction. We address Harold's contentions in turn.

A.

Harold's first contends the district court erred in failing to award it sufficient attorneys' fees on its Oklahoma Antitrust Act claim. Specifically, Harold's argues the district court abused its discretion in awarding it only $30,000.00 in attorneys' fees when Harold's requested $277,173.22, and erred as a matter of law by failing to calculate the fee award on an hour times rate basis.

Section 25 of the Oklahoma Antitrust Act provides that a party who prevails on an antitrust claim "shall recover . . . a reasonable attorney's fee to be fixed by the court." Okla. Stat. tit. 79, §25. An attorneys' fee applicant bears the burden of proving that the time and labor for which he seeks compensation are reasonable and that they relate to a claim for which fees are recoverable. *See Oliver's Sports Ctr. v. National Standard Ins. Co.*, 615 P.2d 291, 295 (Okla. 1980); *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 663 (Okla. 1979). To calculate reasonable attorneys' fees, the district court should "first determine hourly compensation by multiplying hours times rate" and then add to that an amount based on enumerated factors. *Southwestern Bell Tel., Co. v. Parker Pest Control, Inc.*, 737 P.2d 1186, 1188 (Okla. 1987). The factors are set forth in the margin.[14] However, in its discretion and based upon the circumstances of a particular case, "the trial court may consider factors other than reasonable hours multiplied by a reasonable rate in determining a reasonable attorney fee." *Arkoma Gas Co. v. Otis Eng'g Corp.*, 849 P.2d 392, 394 (Okla. 1993); *see also Southwestern Bell Tel. Co.*, 737 P-2d at 1189

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[14]The factors to consider in estimating a reasonable attorneys' fee are:

1. Time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of other employment by the attorney due to acceptance of the case.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time limitations imposed by the client or the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation and ability of the attorneys.
10. The 'undesirability' of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

Southwestern Bell Tel. Co., 737 P.2d at 1188; *see also* Okla. Stat. tit. 5, App. 3-A, Rule 1.5.

(Oklahoma Supreme Court has not "rejected the notion that an attorneys' fee must bear some reasonable relationship to the amount in controversy. It does, and that relationship must be considered in each case where an attorneys' fee is awarded."). We review the district court's award of attorneys' fees for an abuse of discretion, but review legal conclusions that provide a basis for the award de novo. *Tulsa Litho Co. v. Tile and Decorative Surfaces Magazine Publishing, Inc.*, 69 F.3d 1041, 1043 (10th Cir. 1995); *Arkoma Gas Co.*, 849 P.2d at 394.

Turning to the facts of the instant case, Harold's concedes it is not eligible for attorneys' fees on either the copyright infringement claim, *see* 17 U.S.C. §412, or the Oklahoma Unfair Sales Act claim. However, because the state antitrust violation was premised on copyright infringement and sales below cost violations, Harold's maintains it is entitled to attorneys' fees under the Oklahoma Antitrust Act for the time expended proving copyright infringement and the Unfair Sales Act violations. Harold's filed an application for attorneys' fees with the district court, seeking $277,173.22.

The district court stated that Harold's "burden necessarily includes providing the Court with a reasonable basis for allocating fees" between the compensable antitrust claim and the non-compensable copyright and Unfair Sales Act claims. The district court concluded that it was impossible to determine the amount of time Harold's expended on the state antitrust claim and the non-compensable claims. Consequently, the district court awarded Harold's $30,000.00, one-third of the $90,000.00 recovered on the Oklahoma Antitrust Act claim.

Based on the circumstances of this case, we cannot conclude the district court abused its discretion in awarding Harold's $30,000.00 in attorneys' fees on the state antitrust claim. The district court considered the factors outlined in *Southwestern Bell Tel. Co.*, 73 7 P.2d at 1188, and concluded that it was reasonable and appropriate to fix "the attorneys' fees based upon a percentage of Harold's recovery on the antitrust claim." Specifically, the

district court ruled:

> In light of the relatively minor role the antitrust claim played in the trial and pretrial proceedings, and the fact that the recovery under the Copyright Act was more than three times the total recovery under the antitrust claim, it would clearly be inequitable to allow Plaintiff's counsel to "piggy back" large portions of the copyright-related fees onto the antitrust claim. Since the statute governing the . . . [copyright] claim expressly precludes an award of attorney's fees . . . any award of attorney's fees for the antitrust claim should be proportionate to the value of that claim. Moreover, both the overlapping nature of the claims and counsel's "block billing" method make it impossible to allocate specific increments of time to each claim.[15]

The Oklahoma Supreme Court has ruled that "the trial court may consider factors other than reasonable hours multiplied by a reasonable rate in determining a reasonable attorney fee," *Arkoma Gas Co.*, 849 P.2d at 394, including the relationship of the fee requested to the overall value of the claim in determining the reasonableness of a fee award. *See Southwestern Bell Tel. Co.*, 737 P.2d at 1189. We therefore reject Harold's argument that the district court erred as a matter of law when it did not calculate hourly compensation on an hour times rate basis.

B.

Next, Harold's contends the district court erred in failing to

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[15]"Block billing" refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.

award it attorneys' fees and expenses incurred under Fed. R. Civ. P. 37 in proving that Mr. William Dillard, founder, chairman, and chief executive officer of Defendant Dillard, Inc., made a statement reported in a newspaper that Dillard denied in discovery. In 1993, the Dallas Morning News reported that Mr. Dillard stated at a shareholder meeting, "We're going to add more private labeling by attempting to buy merchandise from the same sources the so-called U.S. manufacturers buy from and not pay them a big profit for it." Maria Halkias, *Dillard's Shifting Merchandising Strategy*, Dallas Morning News, May 17, 1993, at 1D. In its response to Harold's request for admissions, Dillard denied that Mr. Dillard had any recollection of making the statement, and eventually deposed Maria Halikias, the newspaper journalist who attributed the statement to Mr. Dillard. Ms. Halkias testified in her deposition that Mr. Dillard made the statement reported in the article. Harold's never deposed Mr. Dillard, although the district court rejected Dillard's motion for a protective order. At trial, Mr. Dillard testified that he made the statement at issue.

Harold's moved for sanctions under Fed. R. Civ. P. 37(c)(2). The district court denied Harold's Rule 37(c)(2) motion, finding that Dillard's failure to admit that Mr. Dillard made the statement was in good faith and for good reason, and was thereby not subject to sanctions. Specifically, the court observed that Dillard "was first asked to admit that Mr. Dillard made the statements some four months after the statements were made. Further, the statements were made during Mr. Dillard's informal, extemporaneous remarks at the annual shareholder's meeting at which no verbatim record was made." On appeal, Harold's asserts that it is entitled to reasonable expenses incurred in proving that Mr. Dillard made the statement attributed to him in the newspaper article because Dillard failed to admit that Mr. Dillard made the statement.

Rule 37(c)(2) provides that a party who denies a request for admission may be liable for expenses, including attorneys' fees, incurred by the other party in later proving the truth of the matter.

Fed. R. Civ. P.37(c)(2). Rule 37(c)(2) provides in relevant part:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves . . . the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. *The court shall make the order unless it finds* that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) *there was other good reason for the failure to admit.*

Fed. R. Civ. P. 37(c)(2) (emphasis added). The Rule mandates an aware of expenses unless the court finds that an exception applies. *Id.*; *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 (9th Cir. 1994). We review the district court's determination whether a party is entitled to expenses under Rule 37(c)(2) for an abuse of discretion. *Marchand*, 22 F.3d at 936.

In the instant case, the district court concluded that Dillard failed to admit that Mr. Dillard made the statement in good faith and for good reason, and exception to the Rule. *See* Fed. R. Civ. P. 37(c)(2)(D) ("The court shall make the order unless it finds that . . . there was other good reason for the failure to admit."). Based on the factors listed by the district court, we do not believe the district court abused its discretion in concluding that Dillard had good reasons for failing to admit that Mr. Dillard made the statement attributed to him by the Dallas Morning News. Thus, we reject Harold's argument that the district court erred by denying its request for fees under Rule 37(c)(2).

C.

Finally, Harold's contends the district court erred by refusing to permanently enjoin Dillard from infringing Harold's existing and future fabric copyrights. Harold's argues that because Dillard infringed Harold's copyrighted print fabric designs for commercial gain and sold the skirts after Harold's filed the compliant, the district court was required to permanently enjoin Dillard from infringing Harold's existing and future copyrights.

Section 502(a) of the Copyright Act authorizes a court to issue a permanent injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. §502(a). A copyright holder that establishes past infringement and a substantial likelihood of infringement in the future is normally entitled to a permanent injunction against the infringer pursuant to §502(a). *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir. 1990); *Pacific and So. Co., Inc. v. Duncan*, 744 F.2d 1490, 1499 (11th Cir. 1984), *cert, denied*, 471 U.S. 1004 (1985); 3 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* §14.06[B], at 14-98 (1995) ("[A] showing of past infringement and a substantial likelihood of future infringement justifies issuance of a permanent injunction.") (quotation omitted). When there is no probability or threat of continuing infringements, injunctive relief is ordinarily inappropriate. Nimmer & Nimmer, §14.06[B], at 14-97 to 14-98. We review the district court's issuance or denial of a permanent injunction for an abuse of discretion. *Securities and Exch. Comm'n v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993). Under this standard, we accept the district court's factual findings unless they are clearly erroneous and review application of legal principles de move. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 939 (4th Cir. 1995).

Applying these principles to the instant case, we reject Harold's argument that it is entitled to a permanent injunction because Dillard infringed Harold's copyrights for commercial gain

and sold the skirts after Harold's filed the complaint. The record establishes that Dillard and Harold's have disposed of all the infringing skirts in Dillard's possession pursuant to an agreement between the parties. Thus, no probability exists that Dillard will continue to infringe Harold's existing copyrighted fabric designs. Further, Harold's has not demonstrated a substantial likelihood that Dillard will infringe Harold's future copyrighted fabric designs. Because Harold's has failed to demonstrate a threat of continuing infringement, it is not entitled to a permanent injunction under §502(a) of the Copyright Act. *See Walt Disney Co.*, 897 F.2d at 567; Nimmer & Nimmer, §14.06[B], at 14-97 to 14-98. We therefore conclude the district court did not abuse its discretion in denying Harold's request for a permanent injunction.

VII.

In sum, we hold the district court did not err by: (1) concluding that the Copyright Act did not preempt Harold's claim under the Oklahoma Antitrust Act; (2) Admitting Dr. Howard's survey; and (3) denying Dillard's renewal motion for judgment as a matter of law after trial. We also conclude the district court did not abuse its discretion by refusing to award Harold's additional attorneys' fees and by denying Harold's request for a permanent injunction.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

ORDER

Before the Court are Defendant Dillard Department Stores, Inc.'s Motion for Partial Summary Judgment and Motion for Partial Dismissal.

I. Attorney Fees and Statutory Damages Under the Copyright Act

Defendant Dillard Department Stores, Inc. ("Dillard's") seeks summary judgment with respect to the Plaintiffs' claims for attorney's fees and statutory damages under Title 17 U.S.C. §412 on the ground that the alleged infringement commenced prior to the effective dates of the asserted copyright registrations.[1] Dillards'

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[1]Title 17 U.S.C. §412 provides:

". . . [N]o award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for —

. . .

evidence demonstrates, and the Plaintiffs acknowledge, that eight of the accused garments were delivered to various Dillard's stores between February and April, 1993, prior to the May 28, 1993 effective date of the copyright registrations. These garments are identified by the parties as:

(1) Style No. 3118503, "Skirt Sarong," a/k/a "Floral Fuchsia Travel Separates II" (Westbound)

(2) Style No. 3118706, "Campshirt S/S Print Fuchsia," a/k/a Travel Separates II" (Westbound)

(3) Style No. 3118716, "S/S Campshirt Print Orange," a/k/a Travel Separates III" (Westbound)

(4) Style No. 3119019, "Short Pull-On Print," a/k/a Travel Separates III (Westbound)

(5) Style No. 3111330, "Skirt Sarong F," a/k/a "Teal Multi Summer Charmers" (Bechamel)

(6) Style No. 3111331, "Skirt Sarong 2," a/k/a "Coral Multi Summer Charmers" (Bechamel)

(7) Style No. 3111332, "Skirt Sarong A," a/k/a "Gold Multi Summer Charmers" (Bechamel)

(8) Style No. 3111333, "Skirt Sarong" a/k/a "Wine Multi Summer Charmers" (Bechamel)

The first publication of these designs occurred, at the latest, when

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(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work."

the skirts bearing those designs appeared in Harold's catalogs and stores in the summer of 1992. The Plaintiffs' copyright registrations for these eight designs were filed on May 28, 1993, which is after the alleged infringement and more than three months after the first publication. The Court concludes, therefore, that the Plaintiffs are not entitled to attorney's fees or damages under the federal copyright statutes with respect to those eight garments; and that Dillards is entitled to partial summary judgment thereon.

The Plaintiffs contend that there were other garments which were delivered to Dillard's stores after the effective date of their copyright registrations, and still other garments which were never delivered. The Court finds that any infringement with regard to these designs occurred after the effective date of the Plaintiffs' copyright registration, and that Section 412 does not preclude recovery of attorney's fees or statutory damages with respect to these designs.

II. Oklahoma Unfair Trade Practices Act Claim

Dillard's also moves the Court to dismiss the Plaintiffs' Second Claim pursuant to Rule 12(b)(6), Fed. R. Civ. Pro., for failure to state a claim for which relief may be granted. The Plaintiffs' Second Claim, as pled in their Third Amended Complaint, alleges in essence, that Dillard's has violated the Oklahoma Unfair Trade Practices Act, title 79 Okla. Stat. §1, by copying Harold's copyrighted designs, and selling the garments below cost.[2] The Oklahoma Unfair Trade Practices Act, Title 79

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[2]The Plaintiffs' Second Claim, as pled in their Third Amended Complaint, alleged:

> 35. The conduct of Dillard's violates 79 O.S. §1 which declares certain acts in restraint of trade within Oklahoma as against public policy and illegal, and Harold's is entitled to such relief as prescribed by 79 O.S. §25.

36. Dillard's gathering of Harold's garments with Plaintiffs' distinctive fabric designs and subsequent unlawful reproduction of Harold's garments into Dillard's own garments which are in some cases identical and in other cases substantially similar to Plaintiffs' distinctive fabric designs, in knowing violation of Harold's rights, with the intent of copying not only Plaintiffs' distinctive fabric designs, but also Harold's "lifestyle" , constitutes an act which is an unreasonable restraint of trade or commerce in Oklahoma.

37. Dillard's unlawful sale of its garments below cost, in violation of the Oklahoma Unfair Sales Act found at 15 O.S. §598.3 specifically plead in Plaintiffs' Third Claim, as well as Dillard's unlawful reproduction, offering for sale, and sale of garments with Plaintiffs' distinctive fabric designs in Oklahoma are acts which substantially lessen competition and unreasonably restrain trade in Oklahoma. Injury to competition has occurred because Dillard's unlawful acts have injured and may permanently injure Harold's, possibly resulting in the elimination of a competitor from the marketplace. Such unlawful, unfair and illegal acts, if left unchecked, irreversibly injures competition generally and is the type of injury the antitrust laws are designed to protect.

38. Dillard's unlawful acts in restraint of trade constitute a per se violation of 79 O.S. §1 because of the pernicious nature of such acts which have no redeeming value because these acts are criminal violations of both the Oklahoma Unfair Sales Act at 15 O.S. §598.4 and the copyright act of 1976 at 17 U.S.C. §506(a), and because these acts are anti-competitive. Competitive injury is presumed from the existence of a per se statutory violation of the antitrust laws. Alternatively, these acts violate 79 O.S. §1 under the rule of reason analysis because the anticompetitive effects on interbrand competition of these garments substantially outweighs any procompetitive benefits which result from such unlawful and illegal acts.

39. Dillard's conduct has cause the type of injury that the antitrust laws are designed to prevent. Not only has Dillard's unlawful and unfair conduct harmed Harold's specifically, but by competing unfairly Dillard's has also harmed competition generally.

40. Among other things, Dillard's unlawful sale of garments with Plaintiffs' distinctive fabric designs throughout the state of Oklahoma, in direct competition with Harold's, is an act in unreasonable restraint of trade.

Okla. Stat. §1, is almost identical to the federal Sherman Act, Title 15 U.S.C. §1, and valuable assistance in interpretation of the Oklahoma Act may be gained from the manner in which various courts have interpreted the Sherman Antitrust Act. *Board of Regents v. National Collegiate Athletic Ass'n*, 561 P.2d 499, 505, n. 13 (Okla. 1977). There is, however, at least one significant difference between the Oklahoma and federal Acts. Whereas the Sherman Act prohibits "[e]very contract, combination in the form of trust, or otherwise, or conspiracy in the restraint of trade or commerce . . . ," the Oklahoma Act prohibits "[e]very act, agreement, combination in the form of trust or otherwise, in restraint of trade or commerce." (Emphasis added). The Plaintiffs' Third Amended Complaint is not deficient for alleging "acts" in restraint of trade rather than a "contract," "combination" or "conspiracy" in restraint of trade.

Under both the federal and Oklahoma antitrust statutes, the courts apply a "rule of reason," under which only those acts or conspiracies which prejudice public interest by unduly restricting competition or unduly restrain trade are unlawful. *Krebsbach v. Henley*, 725 P.2d 852 (Okla. 1986); *Oakridge Investments v. Southern Energy Homes*, 719 P.2d 848, 850 (Okla. App. 1986). To amount to an unreasonable restraint of trade, the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business. *Krebsbach*, 725 P.2d at 858, fn. 18. The antitrust laws were enacted for the protection of competition generally, and not for the protection of competitors. *Id.*

The Plaintiffs rely upon the *Pick-Barth* doctrine, which provides that the intent to eliminate a competitor by unlawful or unfair competition is a *per se* antitrust violation, which does not require a showing of injury to competition. *See Albert Pick-Barth*

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41. In addition to causing damage to competition generally, Dillard's conduct has damaged Harold's specifically, in an amount to be specified prior to trial and further, Harold's is entitled in injunctive relief.

Co. v. Mitchell Woodbury Corp., 57 F.2d 96, 101-02 (1st Cir. 1932), *cert. denied*, 286 U.S. 552, 52 S.Ct. 503, 76 L.Ed. 1288 (1932). The Tenth Circuit has rejected the *Pick-Barth* Doctrine, holding that intent to eliminate a competitor, without a showing of injury to competition generally, is not a *per se* antitrust violation. *Mid-West Underground Storage, Inc. v. Porter*, 717 F.2d 493 (10th Cir. 1983).

The Plaintiffs' Third Amended Complaint, liberally construed, alleges facts from which the Court may infer injury to competition generally. The Third Amended Complaint alleges that Dillards' gathering of Harolds' garments with copyrighted designs, Dillards' unauthorized reproduction of those designs, and sale of those garments below cost "are acts which substantially lessen competition and unreasonably restrain trade in Oklahoma."

A claim should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). These allegations, read in the light most favorable to the Plaintiffs, sufficiently plead injury to competition generally.

III. Oklahoma Unfair Trade Practices Act Claim

Dillard's next seeks summary judgment on the Plaintiffs' claims under the Oklahoma Unfair Trade Practices Act, title 79 Okla. Stat. §§1 *et seq.*, on the ground of federal preemption. Dillard's argues that the Plaintiffs' state law unfair trade claims are "essentially premised upon copying and reproduction of Plaintiffs' alleged copyrighted fabric designs," and that they are therefore preempted by the Federal Copyright Act at Title 17 U.S.C. §301(a). Section 301(a) provides:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of

> copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. §301(a) (emphasis added). Section 301(a) is qualified by Section 301(b), which provides in pertinent part:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —
>
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
>
> (2) any cause of action arising from undertakings commenced before January 1, 1978;
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; . . .

17 U.S.C. §301(b).

A state law claim is thus preempted by Section 301 if: (1) the work is within the scope of the 'subject matter of copyright' as specified in 17 U.S.C. §§102 and 103; and (2) the rights granted

under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. §106. *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.2d 823 (10th Cir. 1993); *citing Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985), *cert. denied*, 479 U.S. 820, 107 S.Ct. 86, 93 L.Ed.2d 39 (1986). In their Third Amended Complaint, Second Claim for Relief, the Plaintiffs allege that Dillard's reproduction of the Plaintiffs' fabric designs, and sale of garments made with such copied designs below cost, violates the Oklahoma Unfair Trade Practices Act.

In order to determine whether the Plaintiffs' Oklahoma Unfair Trade claim asserts rights equivalent to those delineated in the Copyright Act, the Court examines the elements of each claim. *Gates*, 9 F.3d at 847. Federal law will preempt a state-created right if that right may be abridged by an act which, in and of itself, would infringe one of the exclusive rights established by federal law. *Gates*, 9 F.3d at 847, *citing G.S. Rasmussen & Assoc. v. Kalitta Flying Service, Inc.*, 9958 F.2d 896, 904 (9th Cir. 1992), *cert. denied*, ____ U.S. ___, 113 S.Ct. 2927, 124 L.Ed.2d 678 (1993). The Court in *Gates* noted that Section 106 of the federal Copyright Act grants to the copyright owner the exclusive rights to: (1) reproduce the copyrighted work; (2) prepare derivative works; (3) distribute copies of the work; (4) perform the work publicly; and (5) display the work publicly. *Gates*, 9 F.3d at 847. However, if a state law claim requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display, then the state law claim is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action. *Gates*, 9 F.3d at 847, *citing Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992).

To establish a violation of 79 Okla. Stat. §1, the Plaintiffs must demonstrate: (1) That Dillard's committed an act (2) which is in restraint of trade. *See Mid-West Underground Storage, Inc. v. Porter*, 717 F.2d 493, 498 (10th Cir. 1983). Restraint of trade is an

"extra element," beyond mere copying, preparation of derivative works, performance, distribution or display. The essence of the Plaintiffs' state law unfair trade practice claim is conduct which is in restraint of trade, or which interferes with competition. The Court finds that the state law claim is qualitatively different from, and not subsumed within a copyright infringement claim. *Gates Rubber Co.*, 9 F.3d at 847. The Plaintiffs' state law claim is not preempted by the federal copyright statutes.

Dillard's argues in its Reply brief of February 28, 1994 that *Gates Rubber Co. v. Vando Chemical Industries, Ltd.*, 9 F.3d 823, 847 (10th Cir. 1993) requires that the "extra element" must be "actually shown to exist." Dillard's argues that because the Plaintiffs have not submitted prima facie proof of the extra element, it is entitled to summary judgment on the Plaintiffs' state Unfair Trade Practices Act Claim. The Court first notes that Dillard's Motion and opening brief cannot fairly be interpreted as challenging the *merits* of the Plaintiffs' state Unfair Trade Practices Act claim, or the sufficiency of the Plaintiffs' evidence in support of that claim. Dillard's January 14, 1994 Motion makes only a legal argument that the Plaintiffs' state Unfair Trade Practices Act claim is preempted by the federal Copyright Act. Dillard's Reply Brief raises an issue not addressed in its Motion or opening brief. Fundamental principles of fairness dictate that summary judgment not be granted on an issue to which the Plaintiffs have not had a reasonable opportunity to respond. Moreover, the Court notes that to date, Dillard's has filed four motions for partial summary judgment and a motion to dismiss. The deadline for filing any further dispositive motions has passed, and the case is set on the Court's next trial docket. Further briefing would not materially advance the interests of justice.

IV.

Dillards' January 14, 1994 Motion for Partial Summary Judgment is hereby **GRANTED** with respect to the Plaintiffs' copyright infringement claim insofar as it is based upon those eight

accused garments identified herein which were delivered prior to the effective date of the Plaintiffs' copyright registration. Dillards' Motion is hereby **DENIED** in all other respects. Dillards' Motion for Partial Dismissal is hereby **DENIED**.

IT IS SO ORDERED this 21st day of March, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

ORDER

Before the Court are two motions for reconsideration filed by Defendant, Dillard Department Stores, Inc. ("Dillard's").

I.

Dillard's moves the Court to reconsider its Order of March 21, 1994 denying Dillard's motion for partial summary judgment on the issue of federal preemption of the Plaintiffs' Oklahoma Unfair Trade Practices Act Claim ("state antitrust claim"). The Court denied summary judgment on the preemption issue, reasoning that since the state antitrust claim would require proof of an additional element, qualitatively different from copyright infringement.

Dillard's moves the Court to reconsider its Order denying summary judgment on the Plaintiffs' state antitrust claim, arguing that the Plaintiffs' evidence is insufficient on the essential element of injury to competition generally. In its January 14, 1994 Motion, Dillard's sought summary judgment on the ground of federal preemption only, and did not challenge the merits of the Plaintiffs' state antitrust claim. The Plaintiffs' response to that motion was

directed to the preemption issue, and not to the merits of the state antitrust claim. The Plaintiffs' Response Brief indicated that the Plaintiffs "intended" to offer proof of the additional element, i.e., injury to competition generally[1]. After the Plaintiffs' response was filed, Dillard's was permitted to file a reply, in which they argued for the first time that the Plaintiffs had not submitted sufficient proof of the additional element to raise a genuine issue of material fact.

Dillard's was allowed to file its reply although replies are not generally permitted, and are, in fact, disfavored. Local Rule 14, W.D. Okla. The interests of justice preclude the Court from granting summary judgment on an issue which was not fairly raised in the motion and brief, and was asserted for the first time in a reply brief to which the Plaintiffs have had no opportunity to respond.

Dillard's seeks, alternatively, certification of the preemption issue in order to lodge an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit pursuant to Title 28 U.S.C. §1292(b). Section 1292(b) provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it

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[1]*The Plaintiffs also submitted an affidavit from Dr. Donald A. Murry, a proposed expert witness in the field of economics. Dr. Murry's affidavit states, with little explanation, that Dillard's conduct had, and may have in the future, an adverse impact on competition.*

> within ten days of the order: *provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Dillard's contends that there is substantial ground for difference of opinion as to whether the Plaintiffs' state antitrust claim "includes a qualitatively different **element** than copying and sale of copyrightable subject matter, is preempted under 17 U.S.C. §301 when the only asserted act in restraint of trade is the actual copying and sale itself." Even if there is substantial ground for difference of opinion on this issue, the Court finds that an immediate appeal from the order of March 21, 1994 would not materially advance the ultimate termination of this litigation.

II.

Dillard's also moves for reconsideration of the Court's March 21, 1994 Order insofar as it relates to the Plaintiffs' right to recover statutory damages and/or attorneys' fees under the Copyright Act. The Plaintiffs did not contest Dillard's motion for partial summary judgment insofar as it sought a determination that eight specific garments were delivered to various Dillard's stores prior to the May 28, 1993 effective date of the Plaintiffs' copyright registrations. The Plaintiffs contended that there were other accused garments which were delivered after the copyright registration date, and still other garments which were delivered after the copyright registration date, and still other garments which were never delivered.[2]

Dillard's now argues that the Court improperly granted

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[2]*Dillard's claims that it has canceled its orders for those garments which were never delivered. The Court has dealt with the canceled orders in a separate Order.*

summary judgment to the Plaintiffs with regard to the garments delivered after the copyright registration date, and those which were never delivered. Dillard's has misconstrued the Court's order. The Court did not grant summary judgment to the Plaintiffs; rather, the Court merely denied summary judgment to Dillard's with regard to any garments other than those which were delivered prior to the copyright registration date.

The Court notes that during the course of this litigation, Dillard's has filed multiple motions to extend discovery, and multiple motions for continuance of the trial date. Dillard's has filed six separate dispositive motions, and a reply to the Plaintiffs' response to each motion. The sheer volume of paperwork generated by Dillard's has needlessly consumed judicial resources, and has increased the cost of this litigation to both sides. The motions to reconsider presently before the Court, which cite no new law and no new facts, are hereby DENIED.

IT IS SO ORDERED this _____ day of April, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled cause, find as follows:

I. COPYRIGHT INFRINGEMENT CLAIM

Plaintiffs, Harold's Stores, Inc. and CMT Enterprises, Inc. are entitled to recover Plaintiffs' actual damages, if any, and Defendant's profits, if any, from Defendant Dillard Department Stores on their copyright infringement claim.

(a)	Actual Damages	$312,000.00
(b)	Defendant's Profits	$0

II. OKLAHOMA UNFAIR SALES ACT CLAIM

✓ In favor of Plaintiff Harold's Stores, Inc. and against the Defendant Dillard Department Stores, Inc., and assess damages in the amount of $21,780.00.

OR

___ In favor of Defendant Dillard Department Stores, Inc.

III. OKLAHOMA UNFAIR TRADE PRACTICES ACT CLAIM

✓ In favor of Plaintiff Harold's Stores, Inc. and against the Defendant Dillard Department Stores, Inc., and assess damages in the amount of $30,000.00.

OR

___ In favor of Defendant Dillard Department Stores, Inc.

5-16-94
DATE

/s/ L. Edith Petoyanis
FOREMAN/FOREWOMAN

United States District Court

Western District of Oklahoma

JUDGMENT IN A CIVIL CASE

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
v.	)	CASE NUMBER: CIV-93-1212-R
DILLARD DEPARTMENT STORES, INC.,	)	
Defendant.	)	

☒ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED we the Jury, find in favor of the Plaintiff and against the Defendant on all three claims.

May 17, 1994
Date

ROBERT D. DENNIS
Clerk

/s/ Nancy Estep
(By) Deputy Clerk

ENTERED IN JUDGMENT ON 5-17-94

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

ORDER

Before the Court is Defendant Dillard Department Stores, Inc.'s Renewal of Motion for Judgment as a Matter of Law After Trial. Dillard's moves, pursuant to Rule 50 (b), Fed. R. Civ. Pro., for judgment as a matter of law on the state law Unfair Trade Practices Act[1] and Unfair Sales Act[2] claims of Plaintiff Harold's Stores, Inc.

I.

A motion for judgment as a matter of law must be denied if there is evidence upon which the jury could properly find a verdict for the party opposing the motion. *Continental Trend Resources,Inc. v. Oxy USA, Inc.*, 810 F. Supp. 1520, 1522 (W.D. Okla. 1992), *citing Raiala v. Allied Corp.*, 919 F. 2d 610 (10th Cir. 1990), *cert denied*, 500 U.S. 905, 111 S.Ct. 1685, 114 L.Ed.2d 80

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[1]*See* Title 79 Okla. Stat. §§ 1, *et. seq.*

[2]*See* Title 15 Okla. Stat. §598.1, *et seq.*

(1991). In ruling upon a motion for judgment as a matter of law, the Court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. Instead, the Court must view the evidence most favorably to the nonmoving party and give that party the benefit of all reasonable inferences from the evidence. *Continental Trend*, 810 F. Supp. at 1522, *citing Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984) and *Sandlin v. Texaco Ref. & Mktg., Inc.*, 900 F.2d 1479, 1483 n.5 (10th Cir. 1990), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

II.

Dillard's seeks judgment as a matter of law on Harold's Oklahoma Unfair Trade Practices Act claim. Dillard's argues that there is no evidence in the record to support a finding that there was a restraint of trade, or that any such restraint was unreasonable. Dillard's argues, in essence, that Harold's evidence showed, at most, injury to Harold's Stores, Inc., and not injury to competition generally. Further, Dillard's contends that because the jury awarded no profits under the Plaintiff's copyright infringement claim, the jury must have concluded that Dillard's copyright infringement was not willful.

The evidence at trial showed that Dillard's copied certain original fabric designs copyrighted by the Plaintiffs,[3] and sold them in Dillard's stores at prices which were not only below Harold's prices but below Dillards' cost. Though Dillard's has numerous store locations throughout the United States, it sold the vast majority of infringing garments in those locations in which it was in direct competition with Harold's.

In addition, Dr. Murry testified that Dillard's conduct,

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[3] Dillard's stipulated at trial that its accused garments infringed the Plaintiffs' valid copyrights.

which bypassed the development costs associated with creating unique fabric designs, "can make it harder for anyone else to compete." According to Dr. Murry, such conduct creates a barrier to entry for those inclined to enter the market, and makes it more difficult for those already in the market to compete. "[In this particular case," he said, "I think the facts, when you stack them up and look at them, and define these markets, these events are very important to determine that . . . this leads to an anti-competitive result."

The question before the Court is not whether the Plaintiffs' evidence was more persuasive to the Court than the Defendant's evidence, or whether the Plaintiffs' witnesses were more credible to the Court. Rather, the Court considers whether the Plaintiffs' evidence as a whole, viewed in the light most favorable to the Plaintiffs, and with the benefit of all reasonable inferences, is sufficient to permit the jury to properly find that Dillard's conduct unreasonably restrained trade in Oklahoma. The Court concludes that the Plaintiffs' evidence is sufficient to permit such a finding. Dillards' argument that the jury must have found the copyright infringement to be non-willful does not warrant a different result. An implicit finding that the infringement was not willful is not necessarily inconsistent with the jury's finding that Dillards' conduct was anti-competitive.

III.

Dillard's next argues that the Plaintiffs have failed to prove an antitrust injury. Dr. Murry testified that ". . . based on the advice of persons at Harold's and the other experts, and looking at the nature of apparel developing a special niche and identification with product development, . . . there is a clear damage to Harold's due to [Dillards'] action and it's not just — just immediate. . . ." (T. 204-205). Based on this testimony, the jury could properly find that Plaintiff Harold's suffered an antitrust injury.

IV.

Dillard's contends that the Court erred in submitting Harold's Oklahoma Unfair Sales Act claim to the jury because Harold's offered no evidence of the requisite unlawful intent. As the jury was instructed, in order to prevail on its Unfair Sales Act claim, Harold's was required to prove that Dillard's advertised or sold merchandise at less than cost with the intent and purpose of either: (a) inducing the purchase of other merchandise, or (b) unfairly diverting trade from a competitor, or (c) otherwise injuring a competitor to impair or prevent fair competition or to injure public welfare. *See* Title 15 Okla. Stat. §§ 598.1, *et. seq.*

The evidence at trial indicated that the infringing garments were marked down during the pendency of this lawsuit. The markdown was ordered by high-level corporate officials, which is not Dillards' normal practice. The markdowns started at 59% off, whereas Dillard's ordinarily marks merchandise down 25%, then 50%. Based upon this testimony, the jury could properly find that Dillards' below-cost sales were made with the unlawful intent of either unfairly diverting trade from Harold's or of "otherwise injuring" Harold's to impair fair competition.

Dillard's argues that the Harold's evidence fails to establish that Dillard's below-cost sales damaged Harold's. Dr. Daniel Howard, an expert on consumer behavior, testified as to the total amount of damages sustained by Harold's as a result of Dillards' actions, and offered his opinion as to the portion attributable to the below-cost sales. In addition, Rebecca Casey, Chief Executive Officer of Harold's, testified as to Harolds' loss of customer goodwill attributable to Dillards' advertisement, display, and sale of its infringing merchandise. The Court finds that this evidence is sufficient to support the jury's award of damages on Harolds' Unfair Sales Act Claim.

V.

Dillards' Renewal of Motion for Judgment as a Matter of Law is hereby DENIED.

IT IS SO ORDERED this 2nd day of September, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

FIRST AMENDED JUDGMENT

This action came on for trial a Jury, Honorable David Russell, District Judge, presiding, and the issues having been duly tried duly rendered its verdict,

It is Ordered and Adjudged:

That the Plaintiffs, Harold's Stores, Inc. and CMT Enterprises, Inc. recover from the Defendant, Dillard Department Stores, Inc. the sum $260,220.00 in actual damages and $0 in profits on Plaintiffs' Copyright infringement claim.

That the Plaintiff, Harold's Stores, Inc. and CMT Enterprises, Inc. recover from the Defendant, Dillard Department Stores, Inc., the sum of $21,780.00 under the Oklahoma Unfair Sales Act claim (15 O.S. §598.1, *et seq.*); and

$30,000.00 under the Oklahoma Antitrust claim (79 O.S. §1), to be trebled pursuant to 79 O.S. §25 totalling $90,000.00 for the Oklahoma Antitrust claim;

That the sum of the aforesaid judgments totals $372,000.00, with interest thereon from date of judgment until paid at the rate of 5.69% as provided by law, and Plaintiffs' costs of the action; and

That pursuant to 79 O.S. §25, Harold's Stores, Inc. is entitled to recover its reasonable attorney's fees to be fixed by the Court, to the extent such attorney's fees relate to establishing its right to recover damages under the Oklahoma Antitrust claim (79 O.S. §1).

IT IS SO ORDERED this 4th day of October, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Joseph J. Ferretti
D. KENT MEYERS
MACK J. MORGAN III
JOSEPH J. FERRETTI

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CMT ENTERPRISES, INC.

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ATTORNEYS FOR DEFENDANT
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72.94B.JJF

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

ORDER

Before the Court is the Plaintiffs' Motion to Amend Judgment for Permanent Injunction.

In copyright actions, courts traditionally have been willing to grant permanent injunctions once liability is established and a continuing threat to the copyright exists. Title 17 U.S.C. §502(a); *National Football League v. McBee & Bruno's, Inc.*, 792 F. 2d 726 (8th Cir. 1986); *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1499 (11th Cir. 1984) (substantial likelihood of future infringement required) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1867, 85 L. Ed. 2d 161 (1985); *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990); *Superhype Publishing, Inc. v. Vasiliou*, 838 F. Supp. 1220, 1226 (S.D. Ohio 1993); *Sailor Music v. IML Corp.*, 867 F. Supp. 565 (E.D. Mich. 1994). A permanent injunction ordinarily will not lie absent a showing of a threat of continuing or additional copyright infringement. *Schmidt v. Holy Cross Cemetery*, 840 F. Supp. 829 (D. Kan. 1993).

The Plaintiff has amply shown that a number of copyrights were infringed by Dillard's, that the infringement was for

commercial gain, and that Dillard's continued to sell the infringing garments even after this suit was filed. Evidence of such conduct would, in some circumstances, permit the inference of a continuing threat of infringement. *Accord, Superhype*, 838 F. Supp. at 1226; *National Football League v. McGee & Bravo, Inc.*, 792 F.2d 726, 729 (8th Cir. 1986); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). In this case, however, the Court draws no such inference.

The evidence shows that the infringed fabric designs were part of a seasonal line of women's clothing, now more than two years old; and that all of the infringing garments have been disposed of pursuant to the parties' agreement. Under these circumstances, further infringement of those same designs is most unlikely.

The Plaintiffs also seek permanent injunctive relief with regard to all other existing and future copyrights owned by them. Courts have enjoined infringement of future copyrights only in a few instances where the infringed works and the anticipated future copyrighted materials are "closely related, part of a series of works created with a predictable regularity and similar format and function." *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1499 n. 17 (11th Cir. 1984) , *cert. denied*, 471 U.S. 1004, 105 S. Ct. 1867, 85 L.Ed.2d 161 (1985) (television news clipping service enjoined from infringing future copyrighted news video); *National Football League v. McBee & Bruno's, Inc.*, 792 F. 2d 726, 732-33 (8th Cir. 1986) (tavern enjoined from infringing future copyrighted telecasts of professional football games).[4] This case is distinguishable. The Plaintiffs' have not shown any close relationship between the infringed designs and any other copyrighted works they own, or any future copyrighted works they

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[4]The Court notes also that in both *Pacific and Southern* and *National Football League*, the defendant's business practices made it fairly predictable that future copyrights would be infringed. This has not been shown to be the case with Dillard's.

might create or obtain. The Plaintiffs have not shown any substantial likelihood that Dillard's will infringe any other existing or future copyrighted designs or lines of clothing. The Court finds that there is not sufficient likelihood of future infringement to warrant a permanent injunction against infringement of copyrights to be obtained in the future.

The Plaintiffs' Motion to Amend Judgment for Permanent Injunction is hereby DENIED.

IT IS SO ORDERED this 14th day of February, 1995.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	
	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

ORDER

Before the Court is Plaintiff Harold's Stores, Inc.'s Application for Reasonable Attorney's Fees. Harold's seeks an award of attorney's fees for the time expended in connection with its Oklahoma Antitrust Act claim. Title 79 Okla. Stat. §25 provides that any party who prevails on an antitrust claim under that Act "shall recover . . . a reasonable attorney's fee to be fixed by the court."

In this case, Dillard's agrees that a prevailing party is entitled to a reasonable attorney's fee under the Oklahoma Antitrust Act claim, but argues that no fee award should be made in this case. Dillard's argues that the "vast majority" of the $277,173.22 in attorney's fees sought by Harold's relates to the federal copyright infringement claim and, to a lesser extent, the Oklahoma Unfair Sales Act claim.[1] Dillard's asserts that because Plaintiffs' counsel

---

[1]The federal Copyright Act provides: "[N]o award of . . . attorney's fees . . . shall be made for - . . . (1) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the

used "block billing"[2] it is impossible to determine which amount of time is attributable to Harold's antitrust claim, and which is attributable to the non-attorney's fee claims.

Harold's concedes that it is not entitled to attorney's fees in connection with its copyright claims or its Oklahoma Unfair Sales Act Claim. Instead of seeking compensation directly under these Acts, Harold's seeks attorney's fees for the time expended proving infringement and addressing other copyright issues under the state antitrust statutes, on the theory that its antitrust claim was made by proving infringement.

An attorney's fee applicant bears the burden of proving that the time and labor for which he seeks compensation are reasonable and that they relate to a claim for which fees are recoverable. *Ramos v. Lamm*, 713 F. 2d 546 (10th Cir. 1983); *Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291 (Okla. 1980); *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979). In a case where attorney's fees are recoverable for one claim and not for another, the fee applicant's burden necessarily includes providing the Court with a reasonable basis for allocating the compensable and non-compensable time.

Harold's theory of the case is and has been that the anti-competitive acts which constituted an antitrust violation under the Oklahoma Unfair Trade Practices Act were, primarily, the copyright infringement and, secondarily, the sale of some of the infringing goods below cost. Harold's argues here that because it had to prove the copyright infringement in order to prevail on its

---

work." Title 17 U.S.C. §412. The Oklahoma Unfair Sales Act makes no provision for an award of attorney's fees.

[2]"Block billing" refers to the method of time-keeping by which each attorney and legal assistant lists the tasks performed in the case on a daily basis, and enters the total time spent that day, rather than itemizing the time spent on each specific task.

antitrust claim, it should be awarded attorney's fees incurred in proving the infringement.

Oklahoma's Rules of Professional Conduct provide:

1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Title 5 Okla. Stat. App. 3-A, Rule 1.5.

In this instance, it would be inequitable to award Harold's the full cost of proving the copyright violation under the Oklahoma antitrust statutes. At trial and at pretrial, Harold's antitrust claim was clearly secondary to the Plaintiffs' claims under the Copyright Act.

In light of the relatively minor role the antitrust claim played in the trial and pretrial proceedings, and the fact that the recovery under the Copyright Act was more than three times the total recovery under the antitrust claim, it would clearly be inequitable allow Plaintiff's counsel to "piggy back" large portions of the copyright-related fees onto the antitrust claim. Since the statute governing the predominant claim expressly precludes an award of attorney's fees where, as here, the copyrights were unregistered at the time of infringement, any award of attorney's fees for the antitrust claim should be proportionate to the value of that claim. Moreover, both the overlapping nature of the claims and counsels "block billing" method make it impossible to allocate specific increments of time to each claim. Therefore, in lieu of awarding attorney's fees based on an hourly rate, the Court finds it reasonable and appropriate to award attorney's fees in proportion to the benefit conferred by the antitrust claim, by fixing the attorney's fees based upon a percentage of Harold's recovery on the antitrust claim. In making this determination, the Court considers the following factors:

(1) Time, skill and Novelty

— The state antitrust claim, as presented by Plaintiff's counsel, raised rather novel legal issues, particularly counsels theory that a copyright infringement, coupled with sales below cost, has an "anti-competitive effect" warranting relief under the Oklahoma Antitrust Act. With regard to the time expended in this case, it appears to the Court that a relatively small percentage was dedicated to the

antitrust claim. The Court notes, however, that some of the time expended by Plaintiff's counsel in this case was made necessary by conduct of Dillard's and its attorneys in contesting virtually every aspect of this case, with a motion to dismiss, six motions for summary judgment, and several motions to reconsider.

(2) Preclusion of Other Employment

— With regard to preclusion of employment, Harold's contends only that Counsel's acceptance of employment in this case precluded the firm from representing Dillard's and other companies whose business is closely tied to Dillard's.

(3) Fees Customarily Charged in the Locality

— The total amount of fees sought ($277,173.22) and some of the hourly rates charged (up to $235 per hour) are somewhat higher than those customarily charged in the locality for similar legal services. However, it appears that much of the work was performed by associates at a lower hourly rate.

(4) Amount Involved, Results Obtained

— Harold's contends that the amount involved in this case "could well have exceeded $1,000,000" since Dillard's infringement and below-cost sales "if unstopped, could have ultimately resulted in the destruction of Harold's business." The Court notes, however, that the injunctive relief to which counsel refers was granted (by agreement) under the federal copyright laws, and not under the state antitrust provisions. Harold's recovered a jury verdict for actual damages in the amount of $30,000 on its antitrust claim. This award was trebled for a total recovery of $90,000 on the antitrust claim.

(5) Time Limitations

— Any extraordinary time limitations imposed on counsel were promoted by the need for preliminary injunctive relief under the Copyright Act and not to the state antitrust claim.

(6) Length of Relationship

— Counsel represents to the Court that the Plaintiff's law firm has had a professional relationship with Harold's "for many years."

(7) Counsel's Ability and Reputation

— Harold's attorneys enjoy a good reputation in the legal community, have demonstrated their abilities in the area of complex commercial litigation in other cases before this Court, and represented Harold's well in this case.

(8) Fixed or Contingent Fee Agreement

— Plaintiffs' counsel had a modified hourly fee agreement with Harold's, whereby counsel agreed to "cap" the amount of fees at $50,000 for time expended subsequent to September 1, 1993, with the agreement that Harold's would consider paying a bonus to counsel if the attorney's fees exceeded the cap and a successful result was obtained.

Having considered each of these factors, the Court finds that a reasonable attorney's fee award for the antitrust claim would be $30,000.00, or one third of the amount recovered on the antitrust claim.

Harold's Application for Attorney's Fees is hereby GRANTED. Harold's is hereby awarded attorney's fees in the amount of $30,000.00.

IT IS SO ORDERED this 14th day of February, 1995.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

17 U.S.C. §301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
>
> (2) any cause of action arising from undertakings commenced before January 1, 1978;
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or
>
> (4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action

arising from undertakings commenced on or after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f) (1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such actions. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are no equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

79 O.S. §1. Trust in restraint of trade illegal

Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

17 U.S. C. §412 Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

(2)

SUPREME COURT, U.S.
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No. 96-195

In The

Supreme Court of the United States

October Term, 1995

DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

HAROLD'S STORES, INC.,
and CMT ENTERPRISES, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT HAROLD'S STORES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a conflict between the Circuits on the test to be applied in determining whether § 301(a) of the Copyright Act of 1976 preempts a state law cause of action.

2. Whether the Judgment obtained against Petitioner would be affected even if Petitioner received the relief it seeks from this Court.

PARENT/SUBSIDIARIES OF CORPORATE RESPONDENT

There are no related companies, subsidiaries, or affiliates of Respondent Harold's Stores, Inc., which meet the requirements of Rule 29.6.

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STATEMENT OF THE CASE

Nature of Action: Petitioner, Dillard Department Stores, Inc. ("Dillard's"), was sued by Harold's Stores, Inc., ("Harold's") and CMT Enterprises, Inc. jointly for copyright infringement under the Copyright Act of 1976 pursuant to 17 U.S.C. §§ 101 *et seq.* Harold's also sued Dillard's for violations of the Oklahoma antitrust laws, at 79 O.S. § 1, and the Oklahoma Unfair Sales Act, at 15 O.S. §§ 598.1 *et seq.* Judgment was entered against Dillard's on all three claims.

Dillard's currently seeks this Court's review of the Tenth Circuit's decision solely on the grounds that the Tenth Circuit applied an incorrect test in its preemption analysis. Dillard's contends that had the correct test been applied, Harold's state antitrust claim would have been preempted by federal copyright law. Because the state antitrust claim was brought by Harold's only, Dillard's Petition for Writ of Certiorari ("Petition") seeking preemption of Harold's state antitrust claim only affects Harold's. Thus, Harold's is the only Respondent to Dillard's Petition.

Harold's Claim: Dillard's misstates the basis of Harold's state antitrust claim. Both the District and Circuit Courts' opinions reflect the correct basis of Harold's antitrust claim – Harold's alleged and proved that Dillard's act of copyright infringement *and* its pricing conduct of the garments at issue, i.e., selling the garments below cost, constituted acts in restraint of trade which violated the Oklahoma antitrust laws found at 79 O.S. § 1. (A. 22, 24, 42-43 and 58). Assertions by Dillard's to the contrary are incorrect and unsupported by the record.

Ruling on Appeal: Dillard's erroneously argues that the Tenth Circuit disregarded Dillard's conduct in determining whether preemption of Harold's state antitrust claim was proper. The Tenth Circuit (in accord with other circuits) employed the "extra element" test, comparing the elements of Harold's state antitrust claim to the elements of copyright infringement, and inquiring whether the extra element of Harold's state antitrust claim was "qualitatively different" from the copyright infringement claim. (A. 10-14). In determining whether the extra element was "qualitatively different", the Tenth Circuit considered the conduct and the proof required to establish the extra element. (A. 13-14). Employing this analysis, the Tenth Circuit determined that the extra element required proof beyond what is required for a copyright infringement claim, and therefore, the Court affirmed the District Court's ruling that preemption is improper in this case. (A. 13-14).

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between The Circuits On The Test For Copyright Preemption.

The Circuits uniformly apply the same test to determine whether § 301(a) of the Copyright Act of 1976 preempts a state law cause of action. None of the Circuits recognize a purported split relating to the test to be applied in determining preemption. The decision by the Tenth Circuit Court of Appeals in this case did not reject one test for preemption over another; it followed the test applied by all circuits.

Dillard's erroneously argues that the Fourth and Tenth Circuits reject the test for preemption followed by the Second, Fifth, Seventh and Ninth Circuits. Dillard's contends that *only* the Fourth and Tenth Circuits look to whether there exists an extra element beyond that required to prove copyright infringement, while other Circuits disregard the elements of the state law claim and look to whether the "facts pleaded . . . establish qualitatively different *conduct* on the part of the infringing party." (Dillard's Petition at p. 9). Dillard's erroneous argument is based upon quotes taken out of context and does not accurately reflect the tests employed in those Circuits.

The "extra element" test Dillard's ascribes only to the Tenth and Fourth Circuits is the same test employed by the Second, Fifth, Seventh and Ninth Circuits. The opinions cited by Dillard's purportedly standing for the proposition that the Second, Fifth, Seventh and Ninth Circuits do not look at the *elements* of the state cause of action, but rather at defendant's *conduct*, do not so hold.[1] *See, Computer Assocs. Int'l. v. Altai*, 982 F.2d 693, 716-17 (2d Cir. 1992) ("Following this 'extra element' test" . . .); *Harper & Row Publishers v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985)

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[1] Dillard's argues that there is a conflict in the Circuits by acknowledging only part of the Circuits' analysis. In examining the *elements* beyond those necessary to prove infringement, all of the Circuits (including the Tenth) necessarily look at the conduct and proof of that element to determine whether that element is "qualitatively different" from the federal copyright claim. *See e.g., Trandes Corp.* at 659; *Computer Assocs. Int'l* at 716-17; *Harold's* at A. 14.

("Conversely, when a state law violation is predicated upon an act incorporating *elements* beyond mere reproduction . . . preemption will not occur") (emphasis added); *Daboud v. Gibbens*, 42 F.3d 285, 289 (5th Cir. 1995) (the plaintiff has "failed to allege or produce evidence of any element . . . which render [their claims] different in kind from copyright infringement."); *Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663, 678 n.26 (7th Cir. 1986) (agreeing with Congress that preemption should occur when a claim contains "*elements . . . that are different in kind from copyright infringement*") (emphasis in original); *Oddo v. Ries*, 743 F.2d 630, 635 (9th Cir. 1984) ("if violation of the state right is 'predicated upon an act incorporating *elements* beyond mere production or the like,' [sic.] there is no preemption") (emphasis added).

The Tenth and Fourth Circuits actually rely upon and cite to some of the other Circuits with which Petitioner wrongly asserts the existence of a conflict. For example, the Fourth Circuit, in *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 659 (4th Cir. 1993), relied upon Second Circuit decisions (citing to *Harper & Row* and *Computer Assocs. Int'l.* cases, as well as a Ninth Circuit decision). (*See id.* at 659-60). The Tenth Circuit, in its opinion in this case and in the *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 847 (10th Cir. 1993), similarly relies on Second and Ninth Circuit decisions. (*See* A. 10-14).

Because there is no conflict among the Circuits, Dillard's Petition should be denied.

II. The Relief Sought By Dillard's Will Not Affect The Judgment Against Dillard's

Dillard's Petition should also be denied because the relief sought by Dillard's – i.e., a holding that the test for determining whether the Copyright Act of 1976 preempts a state law cause of action requires a consideration of the defendant's conduct rather than an examination of the elements of the state law cause of action – would not alter the judgment in the immediate action against Dillard's.[2]

Dillard's argues that the Tenth Circuit held that Harold's Oklahoma antitrust claim was not preempted by federal copyright law because it had an extra *element* in addition to that which is required to prove copyright infringement, thereby completely disregarding Dillard's *conduct*. Dillard's then argues that other circuits hold that federal copyright law preempts state law causes of action only when the *conduct* of the infringing party goes beyond the mere act of copyright infringement. (Petition, pages 8-9). As shown above, this is not correct. However, Harold's was required to allege *and* prove conduct beyond mere copyright infringement for its Oklahoma antitrust claim. Specifically, Harold's alleged and proved, as part of its proof of the element of restraint of trade in its Oklahoma antitrust claim, that Dillard's violated

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[2] *See*, Robert L. Stern et al., *Supreme Court Practice*, § 4.4, (7th ed. 1993), wherein it is noted that one of the grounds for denying certiorari is when the resolution to a clear conflict is irrelevant to the ultimate outcome of the case before the Court. (See ¶(6) p. 173). As shown above, however, there is *no conflict* between the Circuits.

Harold's copyrights *and* restrained trade by selling the garments below cost.[3]

Thus, while the Tenth Circuit held that Harold's Oklahoma antitrust claim was not preempted by the federal copyright law because the Oklahoma antitrust law claim required an extra element of "restraint of trade" (A. 14), that element required Harold's to prove *conduct* by Dillard's, i.e., that Dillard's not only infringed Harold's copyrights, but additionally sold the garments below cost. (A. 24).

The *combination* of Dillard's copyright infringement *and* sale of those garments below cost combined to create a barrier to entry and thus an unreasonable restraint of trade. (A. 24). As noted by the District Court, Harold's "Third Amended Complaint, alleges in essence, that Dillard's has violated the Oklahoma Unfair Trade Practices Act, Title 79 O.S. § 1, by copying Harold's copyrighted designs, and selling the garments below cost." (A. 42). In footnote 2, the District Court quotes paragraphs 35 through 40 of Harold's Third Amended Complaint, which clearly allege that Dillard's unlawful sale of its garments below cost in violation of the Oklahoma Unfair Sales Act *in conjunction* with Dillard's unlawful reproduction combined as acts which unreasonably restrained trade in Oklahoma. (See specifically paragraph 37 at footnote 2 in A. 43). The District Court noted that "the Third Amended Complaint alleges that Dillard's gathering of Harold's garments with copyrighted designs, Dillard's

---

[3] As Dillard's correctly notes, Harold's also established that Dillard's pricing conduct violated the Oklahoma Unfair Sales Act.

unauthorized reproduction of those designs, and sale of those garments below cost 'are acts which substantially lessen competition and unreasonably restrain trade in Oklahoma.' " (A. 45). The District Court again reiterated that "in their Third Amended Complaint, Second Claim for Relief, the plaintiffs allege that Dillard's reproduction of the plaintiffs' fabric designs, and sale of garments made with such copy designs below cost, violates the Oklahoma Unfair Trade Practices Act." (A. 47).

Although the Tenth Circuit focused its analysis upon the Oklahoma antitrust claim's requirement of an extra element of a "restraint of trade" not present in a federal copyright claim, the conduct which was alleged and proven by Harold's to establish that extra element of restraint of trade required proof of Dillard's sale of garments below cost in violation of the Oklahoma Unfair Sales Act in addition to Dillard's acts of copyright infringement. There can be no dispute that the conduct of Dillard's which established the "extra element" of the Oklahoma antitrust claim satisfies the test for preemption which Dillard's seeks to have adopted. Accordingly, even if Dillard's were to be granted the relief it seeks, the judgment against Dillard's would have to be affirmed. The Petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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No. 96-195

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

HAROLD'S STORES, INC. AND
CMT ENTERPRISES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

HAROLD'S STORES, INC. AND
CMT ENTERPRISES, INC.,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dillard Department Stores, Inc. ("Dillard's") respectfully replies to the Opposition of Respondent Harold's Stores Inc. to Dillard's Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 6, 1996.

REPLY

I. The Relief Sought By Dillard's WILL Affect the Judgment Against Dillard's.

Harold's argues that Dillard's requested relief will not affect the judgment below because Dillard's sales below cost provided the basis for Harold's state-law anti-trust claim to avoid preemption by the Federal Copyright Act. Dillard's submits that this argument is simply a red herring. In fact, Dillard's sales below cost (as distinguished from its infringing sales *per se*) did not occur until well *after* the filing of the Complaint. (Appendix, at 4, 29, and 60). This "sales below cost" conduct by Dillard's was not included in the scope of Harold's original Complaint which, as filed initially, only

sought recovery from Dillard's for violating Oklahoma's antitrust laws on the basis of Dillard's copyright infringement alone. In fact, such conduct was not pleaded until Harold's Third Amended Complaint (Appendix, at 42 and 47) because the conduct had not occurred at the time Harold's filed suit for copyright infringement and violation of the Oklahoma antitrust law based solely upon such copyright infringement.[1]

The Circuit Court below made no mention of the sales below cost claim in analyzing Harold's state antitrust claim. Indeed, the Circuit Court specifically stated:

> Harold's based its Oklahoma Antitrust Act claim on Dillard's copyright infringement of the print fabric skirts and sportswear. Specifically, Harold's alleged in its third amended complaint that Dillard's copyright infringement constituted an act in restraint of trade in violation of the Oklahoma Antitrust Act, Okla. Stat. Tit. 79 § 1. Because Harold's Oklahoma Antitrust Act claim was premised on the same conduct as the copyright infringement claim, Dillard's asserts that § 301 of the Copyright Act preempts Harold's state law antitrust claim. *Harold's Stores v. Dillard Department Stores*, 82 F.3d 1533, 1543 (10th Cir. 1996) (Appendix, at 12).

Thus, the Circuit Court could have sidestepped the issue of preemption by simply holding that the state antitrust claim was supported by the sales below cost claim. However, it did not do so

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[1]"The evidence at trial indicated that the infringing garments were marked down [to below cost] during the pendency of the lawsuit." (Appendix, at 60). .

because clearly the sales below cost were *de minimis*,[2] and Harold's was relying upon the copyright infringement claim to support its state antitrust claim.[3]

Further, it is noted that Harold's sales below cost claim under the Oklahoma Unfair Sales Act was treated by the District Court as a separate basis for an award of damages, independent of both Harold's copyright infringement claim and its Oklahoma antitrust claim. This should further establish that it was not considered as an *extra element* forming part of the state antitrust claim to thus avoid copyright preemption.

Accordingly, Harold's arguments in this regard should be rejected as irrelevant.

II. The Circuits Are In Conflict Regarding the Relevance of the Infringement Defendant's *Conduct*.

Harold's denial that the Circuit Courts are split regarding the relevance of an infringement defendant's conduct in determining whether the Federal Copyright Act should preempt state law causes of action arising out of the copyright infringement ignores the plain language of the decisions. Moreover, and contrary to Harold's assertion, Dillard's does not contend that *only* the Fourth and Tenth

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[2]In fact, Dillard's ". . . offered for sale or had ordered a total of 37,000 garments which infringed Harold's copyrights" (Appendix, at 5), of which only 470 garments were sold below cost in the State of Oklahoma (Joint Stipulation, Appendix, at 81).

[3]In responding to Dillard's argument that the evidence was insufficient to support the damage award on the state antitrust claim, the Circuit Court held "[b]ecause Dillard's infringement of Harold's print fabric skirts in Oklahoma supplied the predicate act for Harold's claim for an antitrust violation under Okla. Stat. Tit. 79, § 1, we conclude that there was evidence to support the jury's damages award on the state antitrust claim." (Appendix, at 28-29). Again, the Circuit Court made no reference to the sales below cost claim nor did it rely on sales below cost as a basis for any damage award for the antitrust claim.

Circuits look to whether there exists an *extra element* beyond that required to prove copyright infringement to determine whether preemption is appropriate — it is not disputed that all of the Circuits purport to seek out such an *extra element*. Rather, Dillard's has demonstrated that in determining whether this *extra element* exists, the Fourth and Tenth Circuits, unlike the Second, Fifth, Seventh, and Ninth Circuits, have held that the *conduct* of the infringement defendant is irrelevant to this analysis. In this regard, the Fourth and Tenth Circuits have held that the infringement defendant "takes the wrong approach by focusing its preemption analysis on the *conduct* alleged to support the two causes of action." *See Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 659 (4th Cir.), *cert. denied*, 114 S.Ct. 443 (1993) (emphasis added) and *Harold's Stores, supra*, 82 F.3d at 1543 (Appendix, at 12).

As a result, the Fourth and Tenth Circuits stand in direct conflict with the Second, Fifth, Seventh, and Ninth Circuits, which require that this *extra element* test be satisfied by "different *conduct* on the part of the infringing party." *See Harper & Row Publishers v. Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) (emphasis added). *See also*, *Daboud v. Gibbons*, 42 F.3d 285, 33 USPQ2d 1441, 1443 (5th Cir. 1995); *Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663, 676-77 (7th Cir. 1986); and *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984).

CONCLUSION

The petition for writ of certiorari should be GRANTED.

Respectfully submitted,

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October 10, 1996

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HAROLD'S STORES, INC. and CMT ENTERPRISES, INC.,	)	
Plaintiffs,	)	CIV-93-1212-R
v.	)	
DILLARD DEPARTMENT STORES, INC.	)	
Defendant.	)	

JOINT STIPULATIONS

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May 4, 1994

STIPULATIONS

Plaintiffs, Harold's Stores, Inc. and CMT Enterprises, Inc., and Defendant, Dillard Department Stores, Inc., in consideration of the mutual stipulations recited herein, agree and stipulate as follows:

1. That Plaintiffs are the owners of the following copyrights entitled: Cap Ferrat, Cap Ferrat - Lemonade, Chain Gang, Chain Gang - Red, Floral Friese, Floral Friese - Coral/Multi, Leaping Lizards, Leaping Lizards - Olive, Mardi Gras, Mardi Gras - Passion Fruit, Northern Exposure, Northern Exposure - Red, Real Life, Real Life - Red, Serape, Serape - Tijuana Red, Sign Language, Sign Language - Pastel, Southwest Scramble, Southwest Scramble - Navy, St. Moritz, St. Moritz - Green, Teepee Totems, Teepee Totems - Red - Teepee Totems - Vicuna, Thunderbird, Thunderbird - Black, Wimbledon, and Wimbledon - Navy and that these copyrights are valid.

2. That Defendant offered for sale and sold garments that are either identical or substantially similar to Plaintiffs' copyrighted fabric designs entitled: Cap Ferrat, Cap Ferrat - Lemonade, Floral Friese, Floral Friese - Coral/Multi, Mardi Gras, Mardi Gras - Passion Fruit, Real Life, Real Life - Red, Serape, Serape - Tijuana Red, Sign Language, Sign Language - Pastel, Teepee Totems, Teepee Totems - Red - Teepee totems - Vicuna, Thunderbird, Thunderbird - Black, Wimbledon, and Wimbledon - Navy, and therefore, Defendant does not contest Plaintiffs' claim that those copyrights were infringed.

3. That the garments which were offered for sale and sold by Defendant subject to Plaintiffs' copyright infringement claims were all in Defendant's stores prior to May 28, 1993, and that

Plaintiffs are not claiming the Copyright Act entitles Plaintiffs to statutory damages and/or attorney's fees because Plaintiffs did not file registrations for any of the copyrights involved in this action until on or after May 28, 1993.

4. Defendant cancelled or did not confirm all orders placed with Wadesboro Manufacturing Companies for garments which would infringe Plaintiffs' copyrights entitled: Chain Gang, Chain Gang - Red, Leaping Lizards, Leaping Lizards - Olive, Northern Exposure, Northern Exposure - Red, Southwest Scramble, Southwest Scramble - Navy, St. Moritz, St. Moritz - Green, and that Plaintiffs are seeking no damages for such cancelled or unconfirmed orders, but are seeking uncontested injunctive relief.

5. That as to the garments offered for sale and sold by Defendant subject to Plaintiffs' copyright infringement claims which were manufactured for Defendant by Cannontex ("the Cannontex Garments") bearing the Dillard's RN number:

(a) The estimated Landed Costs (cost of goods delivered into the United States, including import duties, but not including the cost of transportation to deliver the goods to Defendant's stores and other such costs subsequent to the port of entry in the United States) of the Cannontex garments ranged from $11.78 to $12.24.

(b) The regular retail prices at which Defendant offered the Cannontex garments for sale were either $28.00 or $30.00. On July 21, 1993, Defendant reduced the prices of the Cannontex garments on a system-wide basis to sale prices of $12.00 for the $28.00 garments, and $12.25 for the $30.00 garments. In Oklahoma, Defendant sold a total of 470 of these garments at these prices which were less than cost as defined by 15 O.S. § 598.2(a).

(c) The Cannontex garments were seasonable merchandise.

(d) Sales of the Cannontex garments in Oklahoma ended on or about August 23, 1993 pursuant to the agreement entered into between the parties on August 17, 1993.

6. That as to the garments offered for sale and sold by Defendant subject to Plaintiffs' copyright infringement claims which were manufactured for Defendant by Wadesboro Manufacturing Company ("Wadesboro"):

(a) System-wide, Defendant received a total of 4,480 garments from Wadesboro which were offered for sale by Defendant and are subject to Plaintiffs' copyright infringement claims.

(b) System-wide, Defendant sold a total of 1,652 garments from Wadesboro which are subject to Plaintiffs' copyright infringement claims, returning the balance of 2,828 garments to Wadesboro which are subject to Plaintiffs' copyright infringement claims.

7. That at a hearing before the court on August 17, 1993, on Plaintiffs' motion for temporary injunction to prevent Defendant from continuing to sell the garments which are subject to Plaintiffs' copyright infringement claims, Plaintiffs and Defendant agreed, and with Court approval, that Defendant would no longer sell these garments that are subject to Plaintiffs' copyright infringement claims in competition with Harold's, and that Defendant could continue to sell these garments indefinitely in designated geographical areas that are not in competition with Harold's. That in accordance with this agreement, Defendant moved all remaining garments that are subject to Plaintiffs' copyright infringement claims, to stores in the designated geographical areas, and continued to sell these garments without objection from Plaintiffs.

8. Plaintiffs' sales of its garments bearing the copyrighted fabric designs at issue in the immediate action have not been

reduced as a result of Defendant's sale of its garments that are subject to Plaintiffs' copyright infringement claims.

AGREED FOR PLAINTIFFS: HAROLD'S STORES, INC.

By: _____

CMT ENTERPRISES, INC.

By: _____

AGREED FOR DEFENDANT: DILLARD DEPARTMENT STORES, INC.

By: _____

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